Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

No. 77-782

AMERICAN IRON AND STEEL INSTITUTE, UNITED STATES STEEL CORPORATION, NATIONAL STEEL CORPORATION, REPUBLIC STEEL CORPORATION, WHEELING-PITTSBURGH STEEL CORPORATION, INLAND STEEL COMPANY, ARMCO STEEL CORPORATION, JONES & LAUGHLIN STEEL CORPORATION, BETHLEHEM STEEL CORPORATION, INTERLAKE, INC., ALLEGHENY LUDLUM INDUSTRIES, INC., SHARON STEEL CORPORATION, THE BABCOCK & WILCOX COMPANY, CRUCIBLE, INC., CYCLOPS CORPORATION, DETROIT STEEL CORPORATION, ATLANTIC STEEL COMPANY, LONE STAR STEEL COMPANY, CONTINENTAL COPPER & STEEL INDUSTRIES, INC., THE TIMKEN COMPANY, SHENANGO INCORPORATED, YOUNGSTOWN SHEET AND TUBE COMPANY,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT AND APPENDICES

DAVID MCNEIL OLDS
BLAIR S. MCMILLIN
THOMAS C. WETTACH
ROBERT W. THOMSON
THOMAS J. DUMAN
GEORGE H. VALENTINE

REED SMITH SHAW & MCCLAY
747 Union Trust Building
P. O. Box 2009
Pittsburgh, Pennsylvania 15230

Attorneys for Petitioners

SMITH BROS., LAW PRINTERS, 620 SECOND AVENUE, PITTSBURGH, PA. 15219

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ENVIRONMENTAL PROTECTION AGENCY,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable Warren Burger, Chief Justice of the Supreme Court of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioners pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Third Circuit, entered in this case on August 10, 1977, recalling its mandate and amending its judgment decided on November 7, 1975.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A *infra*) is reported at 560 F.2d 589. The original decision of the Court of Appeals is reported at 526 F.2d 1027 (Appendix D *infra*).

JURISDICTION

The judgment of the court below (Appendix B *infra*) was entered on August 10, 1977. A timely petition for rehearing was denied on September 2, 1977. (Appendix C *infra.*) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether it was proper for the Court of Appeals to recall its mandate eighteen months after the time for certiorari expired, based upon any one or all of the following reasons:

   a) purported incongruencies between the mandate and a later decision of this Court;

   b) inconsistencies between the mandate and later decisions in some other courts of appeals;

   c) unsubstantiated, non-record allegations of damage to the public interest unless the mandate were recalled.

2. Whether the issues left open in *duPont v. Train,* —— U.S. ——, 97 S. Ct. 965 (1977), as to the effect of § 304 of the Federal Water Pollution Control Act ("FWPCA") on the exercise of the powers of the permit grantors to implement the limitations promulgated under § 301 of the FWPCA were properly decided by the Court of Appeals.

STATUTES AND RULES INVOLVED

This case involves Sections 101, 301, 304, 401, 402, 501 and 509 of the FWPCA, 33 U.S.C. §§ 1251, 1311, 1314, 1341, 1342, 1361 and 1369. They are reprinted in Appendix E *infra*. It also involves the Effluent Guidelines and Standards for Iron and Steel Manufacturing Point Source Category, 39 Fed. Reg. 24114, 40 C.F.R. § 420.10 *et seq.*, promulgated June 24, 1974. They are reprinted in Appendix F *infra*.

STATEMENT OF THE CASE

On June 9, 1975, the Court of Appeals heard argument of the challenge by the Steel Industry to the Federal Water Pollution Control Act regulations applicable to that industry's "Phase I" operations—steelmaking as distinguished from steel finishing. The challenged regulations were promulgated in response to requirements of the FWPCA, 33 U.S.C. § 1251 *et seq.*, which created a complicated new regulatory program for industrial (and municipal) effluent discharges.

The law in substance established a permit program for each "point source", the permits to be issued by the states (or the EPA, if a state chose not to "qualify" itself to act as a permit grantor) and to contain effluent limitations. Discharges without permits were made illegal, and it was recited in § 301 of the FWPCA that effluent limitations were to be achieved requiring application of something styled "best practicable control technology currently available" (usually referred to as "BPT") by July 1, 1977, and "best available technology economically achievable" ("BAT") by July 1, 1983.

Section 301 further recited that the identification of BPT (1977) and BAT (1983) was to be made in accordance with guidelines issued under § 304 of the FWPCA. Although § 301 referred to "effluent limitations", it did not specify who was to establish them. Section 304 was clear, however, in its provision that EPA was to issue the "guidelines", and reasonably clear in indicating "factors" to be considered in establishing and applying limitations for individual plants.

Initially, the lower court in its first decision, referred to throughout as *AISI I*, concluded that the EPA Administrator was empowered by § 301 to promulgate nationwide, single-number effluent limitations for categories of operations within an industry. Beyond that, however, the court was faced with the § 304 question of the proper delineation of powers and duties of the Administrator vis-a-vis the local permit-issuing authority.

In the course of construing the command of § 304(b) that the EPA publish regulations which established guidelines for determining 1977 and 1983 effluent limitations—and that such regulations take into account certain statutorily enumerated factors—the court considered both the FWPCA's textual language and legislative history and ascertained that the issue was necessarily one of properly accommodating two competing interests, *i.e.*, preserving nationally uniform effluent limitations while, on the other hand, maintaining a degree of local flexibility in the hands of the § 402 permit grantor. Such accommodation, the court determined, was inconsistent with the EPA argument that § 304 guidelines were intended solely to assist the Administrator himself in setting number limitations for categories of point sources. The court found no merit to the

claim that the congressionally intended accommodation would be achieved by an EPA "variance" regulation sanctioning departures from the rigid, nationally set limitations only upon a permit applicant's successful showing that factors relevant to the point source were "fundamentally different" from those the EPA considered in establishing limitation regulations.

The Third Circuit held in *AISI I* that this basic dilemma of the FWPCA was resolved thusly: Review of §304(b) factors relative to achieving nationwide effluent limitations for categories of point sources lies with the Administrator; by the same token, the Administrator must promulgate guidelines specifying by reference to the same 304(b) statutory factors a carefully circumscribed discretion (a "range") for the use of the local permit issuer who is authorized to make more stringent the § 301 single-number limitations—which perforce are but "base" figures. Accordingly, *AISI I* remanded the regulations for EPA's reconsideration of the § 301 base limitations, as well as promulgation of proper § 304 guidelines.

On February 23, 1977, in this Court's decision in *duPont v. Train, supra,* the EPA's power to issue effluent limitation regulations under § 301 of the FWPCA was upheld. Subsequent to the announcement of the Court's decision the EPA moved the lower court panel which decided *AISI I* to recall its mandate and amend its judgment. After oral argument, the lower court by a 2 to 1 decision sustained the motion on August 10, 1977. The majority stated that it perceived incongruencies in its original mandate with this Court's decision in *duPont* and amended the judgment to remove therefrom any requirement that the EPA by regulations (1) establish ranges of effluent limitations and (2) specify

factors to be considered by permit grantors or (3) reconsider the §301 effluent limitations in light of the "base level" and "ceiling" concepts.

By its amendment of the judgment in *AISI I,* the Third Circuit in all material respects affirmed the EPA's construction of the Act and denied Petitioners a substantial part of the relief originally sought and obtained in their petition for review.

REASONS FOR GRANTING THE WRIT

I. A. This case will permit the Court to delineate for the first time the appropriate limitations on the exercise of the power to recall a mandate.

Although the Court of Appeals stated it recognized the "weighty policy" that there should be an end to litigation, it clearly disregarded that policy when it granted a motion to recall its mandate eighteen months after the time for rehearing and petition for writ of certiorari had expired and long after all parties were to have acted in reliance upon the judgment. As pointed out by Judge Hunter in his dissenting opinion, at issue here is nothing less than our "orderly system of justice." (Appendix A at 25a.) The appropriate limits upon the exercise of this extraordinary power have not been heretofore established by this Court—review of the lower court's action will be a case of first impression.

All courts which have been confronted with the prospect of recalling a mandate have recognized it as an extraordinary remedy to be exercised only in extreme circumstances.[1] In the majority of instances, re-

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1. See for example the discussion in *Greater Boston Television Corp. v. F.C.C.,* 463 F.2d 268, 275-280 (D.C. Cir. 1971), *cert. denied,* 405 U.S. 950 (1972).

call of a mandate case has involved a clarification by the court, often done *sua sponte. E.g., Reserve Mining Co. v. Lord,* 529 F.2d 181 (8th Cir. 1976); *Aerojet General Corp. v. American Arbitration Association,* 478 F.2d 248 (9th Cir. 1973); *Meredith v. Fair,* 306 F.2d 374 (5th Cir. 1962). Since this case did not involve clarification of a mandate, the recall of the mandate was unusual even in the context of that unusual remedy.

Although the court below found that *Greater Boston, supra* note 1, provided helpful guidelines, it recalled its mandate though none of the *Greater Boston* "special reasons" were present. With deference to the lower court, its expansive reading of its own power makes even less clear what limits, if any, there are upon the right to disturb final judgments. Action by this Court is urgently needed to set forth those principles establishing when parties may not rely on the finality of judgments entered and not appealed, and when they may.

B. This Court should grant certiorari to resolve the conflict among the circuits as to the effect of a subsequent decision of this Court on judgments of lower courts.

One reason cited by the Court of Appeals below for recalling its mandate was its perception of purported "incongruencies" between the mandate and this Court's decision in *duPont*. Even assuming *arguendo* that the court was correct in its perceptions, the question becomes whether it was appropriate to change a final order twenty-one months later to make it "consistent" with this Court's decision.

The circuits are divided over the answer to this question. The Eighth Circuit has denied a petition for recall of its mandate because of conflict with a subsequent Supreme Court decision on the basis that such was not an adequate ground for exercise of such a sparingly used remedy. *Iverson v. United States,* 257 F.2d 408 (8th Cir. 1958). In like circumstances, the Tenth Circuit refused to recall its mandate, stating that even a change in the law by the Supreme Court was not such an extraordinary circumstance as to justify relief from final judgment. *Collins v. City of Wichita,* 254 F.2d 837 (10th Cir. 1958). On the other hand, the First, Seventh and Ninth Circuits have felt themselves bound to amend their judgments to conform to a subsequent decision of this Court where the lower court decision was clearly erroneous. *In re Union Nacional de Trabajadores,* 527 F.2d 602 (1st Cir. 1975); *United States v. Kismetoglu,* 476 F.2d 269 (9th Cir. 1973); *Luminous Unit Co. v. Freeman-Sweet Co.,* 3 F.2d 577 (7th Cir. 1924).

A reading of the cases in which recall has been granted because of conflict with a subsequent decision of this Court shows that the later decision of this Court was in each case on "all-fours" with the lower court mandate, and unequivocally to the contrary. Such was not the case here. The lower court specifically pointed out that *duPont* did not show *AISI I* to be "demonstrably wrong". (Appendix A *infra* at 14a.) In fact, the court made special note that this Court cited *AISI I* five times in *duPont,* never once indicating that this Court disapproved of *AISI I.* (Appendix A *infra* at 12a.)

The action taken by the Third Circuit was, therefore, unprecedented. No other court has been willing to erode the integrity of its own judgments and the principle of finality of judgments because of "incongruencies" between its mandate and a subsequent Supreme Court decision. Before other courts fall into like error, we urge the Court to uphold the principle of finality of judgments by restricting the power to recall.

C. Certiorari should be granted to resolve the conflict between the First and Third Circuits on the issue whether a mandate should be recalled to achieve conformity with other courts of appeal.

The court below felt (albeit erroneously) that its interpretation of the FWPCA in *AISI I* was uniformly rejected by all the other circuits.[2] (Appendix A *infra* at 16a-17a.) The court was moved by its sense of rejection to recall its mandate to conform to the other circuits, without considering the correctness of those other holdings. Interestingly, at no point did the lower court intimate that its decision in *AISI I* had been incorrect. There is no known principle of law requiring uniformity among the circuits. Even if all the other circuits uniformly differed with the Third Circuit, that circumstance alone would neither require, nor even make desirable, a change by the Third Circuit in its mandate.

The lower court was the first to act on the issues involved here. If there were a principle of uniformity among the circuits, all the other circuits should have conformed to the decision in *AISI I.* That some did not is apparent—probably because such a principle would reward the first litigant to the courthouse. It does not follow that it is wise to permit the erosion of a judicial bedrock—the need for reasonable finality of judgments —because of the supposed desirability of inter-circuit uniformity.

The First Circuit resolved the circuit uniformity question differently in *Legate v. Maloney,* 348 F.2d 164

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2. The court was incorrect in its characterization of the opinions of other circuits. See discussion *infra* at 15-17.

(1st Cir. 1965). Considering a motion for recall based upon supposed inconsistencies of the court's decision with decisions in other circuits, Judge Aldrich said:

> "If we were in error in this appraisal [of the merits], of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petitions for rehearing and certiorari. There must be an end to dispute." 348 F.2d at 166.

In our case, the lower court in effect treated the position of the other circuits as controlling. *Legate* obviously did not. Where a power exists with the extraordinary reach of recall, conflict as to a principle controlling its utilization requires prompt resolution by this Court.

D. Grave danger to the appellate review system will result unless this Court overturns a decision by the court below to rely on unsubstantiated statements of counsel and to make findings of fact without a hearing.

As an additional basis for recall, the lower court cited the "public interest." Under that rubric, the court lumped together such "facts" as the possibility that the Iron and Steel Industry might be treated differently from other industries, that EPA would be unduly burdened by complying with the mandate, and that delays would result in the issuance of permits to the Iron and Steel Industry unless the mandate were recalled. All such statements as to burden on the EPA, and delays in the permit program, were in effect lifted intact from unsubstantiated allegations made by counsel for EPA either in its Brief or in its oral argument.[3]

Giving weight to these allegations was most improper. Only facts found in the record should be used by the appellate court in making its determination. The Court of Appeals had before it no record facts developed in any type of hearing or proceeding to establish that the permit program was being delayed or that the Agency would be unable to carry out the remand mandate. While in some cases representations of fact not susceptible to serious challenge may be incorporated into the factual fabric of an adjudication, such was not

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3. The EPA had previously asserted in oral argument in the companion case involving the Phase II Iron and Steel Regulations that the permit program was unimpeded by the absence of regulations. See also *Republic Steel Corp. v. Train,* 557 F.2d 91 (6th Cir. 1977), and *United States Steel v. Train,* 556 F.2d 822 (7th Cir. 1977).

the situation here. Petitioners do not agree that any of the "factual" statements referred to by the court were true.

Acceptance by the lower court of EPA's contentions relative to the Agency's burden in complying with the remand seems particularly unsound. All the pertinent aspects of the remand were obvious when the mandate was originally handed down. No facts came into existence after the original judgment changing the burden one whit. Since the EPA waived its right to appeal the mandate, it should not have been given credence in its complaint that the mandate required it to undertake activity it considered burdensome. More to the point, by its unseemly procrastination in discharging its duties under the remand, the Agency performed the miracle of transforming its "burden" into a blessing—since the lower court found support for the exercise of the recall power in the circumstances that the remand had not been completed.

Apparently itself somewhat troubled whether there was sufficient cause to recall the mandate, the court comforted itself with the observation that the effect of the amendments to the mandate was "relatively modest" and affected only a "minor segment of . . . [a] lengthy opinion." (Appendix A at 22a.) The obvious fact is, however, that this surgery removed almost everything in the mandate favorable to Petitioners. After eighteen months of reliance upon the mandate in the conduct of their business activities and permit negotiations with the EPA, Petitioners have been summarily denied favorable results obtained by a lengthy proceeding in a Court of Appeals. After the time for rehearing and certiorari had expired, Petitioners were justified in relying upon the judgment. See *Civil Aeronautics Bd. v. Delta Air Lines,* 367 U.S. 316 (1961).

II. The decision in duPont left unresolved and in conflict issues as to the basic administration of the Act, and this case presents an appropriate opportunity to resolve those issues.

This Court in *duPont* answered in the affirmative the question of whether the Administrator has the power to promulgate, as regulations, effluent limitations for classes and categories of point sources—a conclusion which was in complete accord with *AISI I*. Left unresolved, however, were questions as to the power and authority of the permit grantors to take into account the factors identified in § 304 of the Act in applying in a given permit situation the effluent limitations established pursuant to § 301.

Although the issue was not before this Court in *duPont,* there was a tacit recognition that § 304 requires from the Agency guidelines to govern the discretion of the permit grantors in setting limits for individual plants. As stated by this Court:

> "The legislative history . . . makes it clear that § 304 guidelines are not merely aimed at guiding the discretion of permit issuers in setting effluent limitations for individual plants." 97 S. Ct. 976.

Understandably this Court did not consider the form of the guidelines and their relation to § 301 limitations in the permit-granting process.

Eight courts of appeals have addressed in various ways the issue of the relation of §§ 301 and 304 to the exercise of the permit-granting power. For example, the Third Circuit in *AISI I* harmonized the potential inconsistencies between the § 301 requirement of uniformity in effluent limitations and the § 304 recognition of in-

dividual plant differences by holding that the § 301 numbers represented base level limitations and that the Administrator was required to indicate ranges of discharge levels more stringent than the base levels and to publish guidelines specifying § 304 factors to be considered by permit grantors in setting limits more stringent than the base level for individual point sources.

This approach was subsequently adopted by the Eighth Circuit Court of Appeals in an unpublished Opinion in *Grain Processing Corp. et al. v. Train,* Doc. No. 76-1233, decided on December 3, 1976.[4] The Third Circuit view was rejected by the Second Circuit[5] and the District of Columbia Circuit[6] which found that permit issuers had no discretion to vary from § 301 effluent limitations.

The approach taken by the Fourth[7] and Tenth Circuits[8] to the question was consistent with the spirit if not the letter of that adopted by the Third Circuit in *AISI I.* They held that the § 301 effluent limitations were only "presumptively applicable" to an individual plant and that if the applicant for a permit showed the inappropriateness of the limitations as applied to him, the permit issuer had the power to go outside of the § 301

4. See Appendix G *infra.*

5. *Hooker Chemical v. Train,* 537 F.2d 620 (2d Cir. 1976).

6. *American Paper Institute v. Train,* 543 F.2d 328 (D.C. Cir. 1976).

7. *duPont v. Train,* 541 F.2d 1018, *aff'd in part, rev'd in part* ..... U.S. ....., 97 S. Ct. 965 (1977) and *Appalachian Power v. Train,* 545 F.2d 1351 (4th Cir. 1976).

8. *American Petroleum Institute v. Train,* 540 F.2d 1023 (10th Cir. 1976).

limitations. Inappropriateness in the Fourth Circuit's view could be established by considering the generic factors of § 304.[9] Although the Tenth Circuit was not so specific, it clearly affirmed the concept of flexibility at the permit level.

The Fourth and Tenth Circuits differed from *AISI I* in not requiring the Administrator to publish guidelines under § 304 to aid the permit grantors in the exercise of their discretion at the permit level. Although they did not require publication of definitive guidelines, the Fourth and Tenth Circuits recognized discretionary power at the permit-granting level to consider individual point source factors specified in § 304 or otherwise. Thus, although different accommodations of §§ 301 to 304 (and vice versa) were identified, the circuits sought to achieve a similar goal—to find flexibility in the Act with reference to the exercise by the permit grantor of his power.

It is accordingly apparent that, contrary to the conclusion of the court below, only two of the seven circuit courts faced with construction of the Act substantially departed from the *AISI I* approach to the § 304 issue in the perspective of discretion at the permit level. The remaining courts have either followed that approach or have adopted a cognate one.[10]

9. 545 F.2d at 1358.

10. In *Republic Steel Corporation v. Train,* 557 F.2d 91 (6th Cir. 1977), the court quoted approvingly the relevant part of the *AISI I* holding, even though the § 304 issue was not technically before it. In *United States Steel v. Train,* 556 F.2d 822 (7th Cir. 1977), a case cited by the lower court as an illustration that sister circuits were united in their opposition, the Seventh Circuit specifically noted that its decision was compatible with *AISI I. Id.* at 843-844.

CONCLUSION

In summary, this case presents the Court with an opportunity to delineate for the first time the basic contours of a circuit court's power to recall a mandate. At least two of the grounds relied upon by the court below—eliminating "incongruencies" with a subsequent Supreme Court decision, and achieving inter-circuit uniformity—have never before been advanced by any court. Parenthetically, neither ground has factual support in this case. Furthermore, as a separate reason for granting certiorari, this case will enable the Court to answer an important question involving the fundamental administration of the FWPCA, a question left open in *duPont v. Train, supra.*

Respectfully submitted,

DAVID MCNEIL OLDS
BLAIR S. MCMILLIN
THOMAS C. WETTACH
ROBERT W. THOMSON
THOMAS J. DUMAN
GEORGE H. VALENTINE

REED SMITH SHAW & MCCLAY
747 Union Trust Building
P. O. Box 2009
Pittsburgh, Pennsylvania 15230

Attorneys for Petitioners

APPENDICES

Appendix A

AMERICAN IRON AND STEEL INSTITUTE, *et al.*,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Nos. 74-1640, 74-1642, 74-1962, 74-2006 and 74-2256.

United States Court of Appeals, Third Circuit.

Argued June 9, 1977.

Decided Aug. 10, 1977.

Before ADAMS, HUNTER and GARTH, Circuit Judges.

OPINION OF THE COURT

ADAMS, Circuit Judge.

The EPA has moved this Court to recall the mandate and to amend the judgment in *American Iron and Steel Institute v. EPA (AISI I)*,[1] decided by us on No-

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1. 526 F.2d 1027 (3d Cir. 1975).

The present opinion should be read in conjunction with the original opinion in *AISI I*. With respect to the technical details of the water pollution regulations at issue here, we shall assume familiarity with our earlier opinion which discusses such matters at length.

Subsequent to *AISI I*, this Court decided *American Iron and Steel Institute v. EPA*, 543 F.2d 521 (3d Cir. 1976) (*AISI II*). That later case concerned the jurisdictional question whether regulations that permitted adjustments in effluent limitations for certain individual point sources were reviewable by a court of appeals. But the panel ruled that such regulations were not reviewable.

Currently pending before this Court are several petitions for review of effluent limitation regulations applicable to "secondary" or finishing operations within the iron and steel industry. *American Iron and Steel Institute v. EPA*, Docket Nos. 76-1386, 76-1749, 76-1751, 76-1757, 76-2176 and 76-2232 (*AISI III*).

vember 7, 1975. Two primary issues must be considered in connection with such a request: first, whether—and, if so when—this Court has the power to reconsider and modify a judgment after the time for rehearing has expired; and second, whether the EPA's motion to recall the mandate should be granted under the circumstances present here.

I.

This controversy originally arose when the American Iron and Steel Institute and several steel companies petitioned this Court to review water pollution regulations designed by the EPA. Promulgated for companies engaged in basic iron and steel manufacturing operations, such regulations established single-number effluent limitation standards for point sources in the industry.[2] In seeking judicial review, the Institute and the other petitioners challenged the authority of the EPA to issue effluent limitation regulations and contended that, in any event, such regulations failed to conform to the requirements of the Federal Water Pollution Control Act Amendments of 1972 (Act).[3] Although this Court held that the EPA has the power to issue the regulations in question,[4] the regulations were deemed to diverge, in certain respects, from the statutory strictures.

Specifically, the *AISI I* panel ruled that the regulations were not consistent with § 301[5] and § 304[6] of the

2. *See* 39 Fed. Reg. 24114, 40 C.F.R. §§ 420.10 *et seq.*
3. 33 U.S.C. §§ 1251 *et seq.* (Supp. 1977).
4. 526 F.2d at 1035-42.
5. 33 U.S.C. § 1311.
6. *Id.*, at § 1314.

Act. We construed those provisions to require that the § 301 limitations represent "both the base level or minimum degree of effluent control permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category",[7] and that the § 304 guidelines "provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling."[8]

Consonant with such an interpretation, the EPA was instructed to promulgate, on remand, § 304 guidelines which would specify "permissible 'ranges' of limitations" and "factors to be taken into account" by permit-issuing authorities in setting effluent limitations for particular point sources.[9] Also, the Administrator was ordered to "reconsider the [§ 301] limitations with the base level and ceiling concepts in mind."[10] The matters to be dealt with on remand, and the underlying rationales, are delineated in considerable detail in the *AISI I* opinion.[11]

7. 526 F.2d at 1045.
8. *Id.*
9. *Id.*
10. *Id.* at 1047.

The "base level" and "ceiling" concepts are closely tied to the "range" issue. For purposes of this opinion, all subsequent references to "ranges" should be deemed to encompass the "base level" and "ceiling" principles as well.

11. Following the issuance of the opinion in *AISI I*, the EPA did not submit a petition for rehearing before this Court. Nor did it file a petition for certiorari with the Supreme Court. The EPA thus did not avail itself of the normal mechanisms for review of a panel decision.

Immediately after our decision in *AISI I,* four other courts of appeals considered the "range" and "guidance" questions.[12] Each of these tribunals, however, reached a conclusion contrary to that of this Court: they sustained single number effluent limitation regulations, as designed for various industrial categories, and declined to order the EPA to reconsider or amend its § 301 and § 304 standards. As a result, the position of this Court with respect to the "range", "guidance" and related matters deviates from that of all other courts of appeals which have spoken on the issue.

Despite such a schism, the EPA has initiated efforts to develop regulations and guidelines for the iron and steel industry in conformity with the mandate of this Court. Nonetheless, we were advised at oral argument that only limited progress has been made in developing "ranges" and "guidance" factors. Perhaps such lack of advancement reflects the magnitude of the EPA's duties on remand as well as its anticipation that the Supreme Court would settle the uncertainty whether the tasks prescribed by this Court are required by the Act.

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12. *See Hooker Chemicals & Plastics Corp. v. Train,* 537 F.2d 620 (2d Cir. 1976); *American Frozen Food Institute v. Train,* 176 U.S.App.D.C. 105, 539 F.2d 107 (1976); *FMC Corporation v. Train,* 539 F.2d 973 (4th Cir. 1976); *American Petroleum Institute v. EPA,* 540 F.2d 1023 (10th Cir. 1976); *duPont v. Train,* 541 F.2d 1018 (4th Cir. 1976); and *American Paper Institute v. Train,* 177 U.S.App.D.C. 181, 543 F.2d 328 (1976).

More recently, the Second Circuit reaffirmed its position regarding the "range", "guidance" and associated problems. *See California & Hawaiian Sugar Co. v. EPA,* 553 F.2d 280 (2d Cir. 1977). The Seventh Circuit has also joined the ranks of the above four courts of appeals. *U. S. Steel v. Train,* 556 F.2d 822 (7th Cir. 1977).

On February 23, 1977, the Supreme Court decided *E. I. duPont de Nemours and Company v. Train*[13]—its first foray into the interpretative morass surrounding § 301 and § 304 of the Act. That case concerned the review of a set of regulations crafted by the EPA for the inorganic chemical industry which are essentially identical in form to those implicated in *AISI I.* And the *duPont* Court approved the single-number effluent limitations as promulgated.

Thereafter, the EPA filed its motion to recall the mandate and modify the judgment in *AISI I.* The agency asserts, *inter alia,* that the construction of the Act as set forth in the opinion of this Court, together with the instructions to develop "range", "guidance" and related factors for regulation of the iron and steel industry, deviates from the Supreme Court's opinion in *duPont.*

Given this backdrop, we proceed to determine whether this Court may reconsider and modify a judgment following the expiration of the rehearing period and, if so, whether the relief that the EPA seeks is appropriate in the present context.

II.

A.

It is not surprising that there are relatively few precedents dealing with the question whether a court of appeals possesses the authority to recall a mandate. Undoubtedly, litigants may have been deterred from bringing "recall" petitions by the weighty policy interests which undergird the salutary principle that there should be an end to a controversy in litigation: Not only should parties be entitled to rely on a judgment as the final

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13. —— U.S. ——, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977).

settlement of their dispute, but courts must be able to clear their dockets of decided cases in order to permit them to hear new controversies which have arisen and require resolution by the judicial process. Put another way, parties should be afforded ample opportunity to litigate their claims, but once a final disposition is reached they should not expect that the good offices of the court will be available for a chance to press their claims anew.

Despite these considerations, it would appear that an appellate court does have the power to recall a mandate in appropriate instances. Insofar as we have been able to ascertain, this Court has not spoken on the issue.[14] But many of our sister circuits have accepted,

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14. Within a footnote in *Root Refining Co. v. Universal Oil Products Co.*, 147 F.2d 259, 260 n.2 (3d Cir. 1945), this Court stated: "if no corruption [in procuring judgments] had been practiced this court would not have possessed the power to reopen its judgments or to recall its mandates after the end of the term." However, the *Root* decision subsequently was reversed by the Supreme Court, 328 U.S. 575, 66 S.Ct. 1176, 90 L.Ed. 1447 (1946), and so we are not bound by the sentiments expressed in the footnote.

More importantly, while it was once recognized that expiration of a court's term precluded any modification of an adjudication decided therein, *see, e. g., Bronson v. Schulten,* 104 U.S. 410, 26 L.Ed. 797 (1882), the "term" concept no longer retains much significance, especially since the enactment of 28 U.S.C. § 452. See *Greater Boston Television Corp. v. F.C.C.,* 149 U.S.App.D.C. 322, 463 F.2d 268, 276 (1971), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972).

Finally, it may be that the term restriction was somewhat less rigid than the *Root* Court believed. *See, e. g., Hazel-Atlas Co. v. Hartford Co.,* 322 U.S. 238, 244-45, 64 S.Ct. 997, 88 L.Ed. 1250 (1944).

without question, the proposition that courts of appeals may vacate their judgments in certain limited circumstances.[15] Apparently, no court now takes the position that a federal tribunal lacks authority to recall its own mandate.

The source of the power to recall a mandate has not been conclusively identified. One court of appeals has discovered a "foundation in statute" for judicial authority to recall a mandate.[16] It points to 28 U.S.C.

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15. *See, e. g., Reserve Mining Co. v. Lord,* 529 F.2d 181 (8th Cir. 1976); *Perkins v. Standard Oil Co. of California,* 487 F.2d 672 (9th Cir. 1973); *Powers v. Bethlehem Steel Corp.,* 483 F.2d 963 (1st Cir. 1973); *Aerojet-General Corp. v. American Arbitration Ass'n,* 478 F.2d 248 (9th Cir. 1973); *Greater Boston Television Corp. v. F.C.C.,* 149 U.S.App.D.C. 322, 463 F.2d 268 (1971); *Gradsky v. United States,* 376 F.2d 993 (5th Cir. 1967), *cert. denied, Grene v. United States,* 389 U.S. 908, 88 S.Ct. 224, 19 L.Ed.2d 224 (1967); *Legate v. Maloney,* 348 F.2d 164 (1st Cir. 1965); *Meredith v. Fair,* 306 F.2d 374 (5th Cir. 1962); *Yanow v. Weyerhaeuser Steamship Co.,* 274 F.2d 274 (9th Cir. 1958); *Hines v. Royal Indemnity Co.,* 253 F.2d 111 (6th Cir. 1958).

The Supreme Court also has recognized the power of federal courts, both trial and appellate, to alter or set aside judgments after their final entry. *See, e. g., Hazel-Atlas Co. v. Hartford Co.,* 322 U.S. 238, 244, 64 S.Ct. 997, 1000, 88 L.Ed. 1250 (1944), in which the Court stated:

> [I]n most instances society is best served by putting an end to litigation after a case has been tried and judgment entered. This has not meant, however, that a judgment finally entered has ever been regarded as completely immune from impeachment . . . [U]nder certain circumstances . . . relief will be granted against judgments regardless of the term of their entry.

16. *Greater Boston Television Corporation v. FCC,* 463 F.2d 268 (D.C. Cir. 1971), *cert. denied,* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972).

§ 2106, which expressly authorizes an appellate court to affirm, modify or vacate any judgment as that court may deem to be "just under the circumstances." While, on its face, § 2106 seems to apply primarily to review by an appellate tribunal of a judgment or order of an inferior court, arguably the statute sanctions reassessment by a court of appeals of its own decisions as well.[17]

Most courts of appeals have rooted the authority to recall a mandate in the "inherent power" of a court. The Eighth Circuit, sitting *en banc,* has posited, for example, that a mandate may be recalled "[i]n the exercise of this court's supervisory power over [a] litigation and in order to protect the integrity of this court's [earlier] mandate. . . ."[18] Likewise, a panel of

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17. Another court of appeals has suggested that Fed.R.Civ.P. 60(b) may constitute a basis for granting a recall motion, since that procedural provision permits a court "on motion and upon such terms as are just. . . . [to] relieve a party or his legal representative from a final judgment . . . [for] any . . . reason justifying relief from the operation of the judgment." *Yanow v. Weyerhaeuser Steamship Company,* 274 F.2d 274 (9th Cir. 1958). Nonetheless, there may be some question whether Rule 60(b) provides authority for recall of a mandate in the Third Circuit. This is so because, unlike the Ninth Circuit (*see id.* at 278), this Court has *not* generally construed the Federal Rules of Civil Procedure to apply to appellate proceedings. Nor does Rule 81 appear to make Rule 60(b) pertinent here. *See also Hines v. Royal Indemnity Company,* 253 F.2d 111, 113 (6th Cir. 1958), in which the Court declared: "The Rules of Civil Procedure apply to procedure in the District Courts, not to the Court of Appeals."

18. *Reserve Mining Co. v. Lord,* 529 F.2d 184, 188 (8th Cir. 1976). *See, e. g., Powers v. Bethlehem Steel Corporation,* 483 F.2d 963 (1st Cir. 1973); *Perkins v. Standard Oil Company of California,* 487 F.2d 672, 674 (9th Cir. 1973).

the Ninth Circuit has declared: "The authority of a Court of Appeals to recall a mandate is not conferred by statute, but its existence cannot be questioned. . . ."[19]

Thus, although there are various possible sources of judicial power to recall a mandate, it is well recognized that a court of appeals has such authority. In light of this recognition, and reflective of the fact that the parties to the present controversy do not contest such a premise, we conclude that this Court may amend the judgment in *AISI I,* should such action prove appropriate.

B.

While the parties do not dispute the elemental power of the Court to recall a mandate, they disagree as to whether such relief is in order in the case at hand. Before seeking to resolve this question, however, we first must define the parameters which will frame our inquiry.

The existing precedents provide some guidance as to when it is appropriate to amend a judgment after the time for rehearing has concluded. All of the courts of appeals have emphasized that recall of a mandate is an extraordinary remedy, one to be used sparingly. And their opinions teach that recall may be warranted for "good cause,"[20] to "prevent injustice,"[21]

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19. *Aerojet-General Corporation v. American Arbitration Ass'n,* 478 F.2d 248, 254 (9th Cir. 1973).

20. *See, e. g., Aerojet-General Corporation v. American Arbitration Ass'n,* 478 F.2d 248, 254 (9th Cir. 1973); *Greater Boston Television Corporation v. F.C.C.,* 463 F.2d 268, 277 (D.C. Cir. 1971).

21. *See, e. g., Aerojet-General Corporation v. American Arbitration Ass'n,* 478 F.2d 248, 254 (9th Cir. 1973); *Gradsky v. United States,* 376 F.2d 993, 995 (5th Cir. 1967).

or in "special circumstances."[22] Such phrases indicate that exercise of the authority to alter a judgment falls within the *discretion* of the court, but that such discretion should be employed to recall a mandate only in unusual instances.

A few courts have attempted to enunciate specific standards for determining whether sufficient "good cause" exists to justify the recall of a mandate. The most pertinent opinion in this regard is *Greater Boston Television Corporation v. F.C.C.*[23] There, Judge Levinthal presented a series of hypothetical situations in which recall of a mandate might be proper, including (1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same time; and (4) where it is necessary to revise an "unintended" instruction to a trial court that has produced an unjust result.[24]

Greater Boston also implicitly recognized a fifth criterion by reference to an earlier First Circuit opinion, *Legate v. Maloney*,[25] in which it was suggested that recall of a mandate might be justified if a subsequent Supreme Court decision "showed that [the] original judgment was demonstrably wrong."[26] In sum, then, the

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22. *See, e. g., Powers v. Bethlehem Steel Corporation*, 483 F.2d 963, 964 (1st Cir. 1973); *Greater Boston Television Corporation v. F.C.C.*, 463 F.2d 268, 280 (D.C. Cir. 1971).

23. 463 F.2d 268 (D.C. Cir. 1971).

24. *Id.* at 278-279.

25. 348 F.2d 164 (1st Cir. 1965).

26. 463 F.2d at 278 and note 12, *quoting Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965).

opinion in *Greater Boston* attempts to set forth guidelines as to when a court of appeals may properly amend one of its decisions—guidelines that may prove to be helpful in the present case.

Above all, though, recall of a mandate is a mode of relief that falls within the ambit of a court's discretion. Ordinarily, such discretion should not be exercised to modify or vacate a prior judgment, absent good cause or unusual circumstances. And decisions concerning the propriety of such relief must be rendered on a case-by-case basis.

With these precepts in mind, we turn to a consideration whether recall of the mandate is warranted in the instant setting.

III.

A.

In support of its motion to recall the mandate, the EPA primarily relies on the opinion of the Supreme Court in *duPont*[27] filed subsequent to the decision in *AISI I*. The agency maintains that the interpretation of the Act set forth in *AISI I* is "clearly inconsistent" with the statutory construction expressed in *duPont*. According to the EPA, the Supreme Court's approval of single-number effluent limitation regulations, roughly identical to those considered by this Court, obviates the need for development of "ranges" and "guidance" factors during the course of a remand in this litigation.

The EPA, in so arguing, seemingly endeavors to come within the reach of the fifth criterion adverted to in *Greater Boston*—that recall of a mandate might

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27. —— U.S. ——, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977).

be appropriate when a later Supreme Court decision reveals that the original judgment was "demonstrably wrong."[28] But it is important to emphasize that we do not believe that the *duPont* case has, to any great extent, called into question the validity of the analysis in *AISI I*.

As we read *duPont,* that decision in no way sounds the death knell for *AISI I* that the EPA would have us perceive. To the contrary, the *duPont* opinion affirms much of the statutory interpretation espoused by this Court in *AISI I*. In both *duPont* and *AISI I*, a central issue was whether, under the Act, the EPA possesses the power to set industry-wide effluent limitation regulations. Like this panel, the Supreme Court concluded that the EPA does, indeed, have authority under § 301 to promulgate industry-wide regulations limiting effluent discharges.[29] Moreover, the *duPont* Court seemingly did not view *AISI I* with disapproval, citing our opinion no less than five times.[30] Had *AISI I* been wrongly decided, the Supreme Court surely would have been reluctant to refer to it in such fashion.

Even though *AISI I* appears to retain its fundamental vitality under *duPont,* we recognize that the Supreme Court specifically did not remand the regulations to the EPA for further refinement. Not only did the *duPont* Court decline to order the development of "range" or "guidance" factors for the § 304 guidelines, but it did not direct any alteration of the § 301 regula-

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28. *See* notes 25 and 26 and accompanying text *supra*.

29. *Compare* —— U.S. at ————, 97 S.Ct. 965, *with* 526 F.2d at 1035-42.

30. *See* —— U.S. at ——, ——, 97 S.Ct. 965.

tions themselves. Instead, the Court approved the single-number regulations as issued, recognizing that such limitations make "some allowance . . . for variations in individual plants . . . by including a variance clause. . . ."[31]

With respect to the duties imposed upon the EPA by § 304 of the Act, the *duPont* Court declared that the agency's use of subcategories satisfies Congressional expectations regarding a "range" of best practicable and best available treatment levels.[32] Also, the Supreme Court concluded that, under procedures adopted by the EPA, the purposes of the § 304 guidelines—including that of providing guidance to permit issuers—had been "substantially achieved." Such procedures entail the utilization of a development document and other supporting materials as well as the agency's practice of obtaining comments on such materials and any proposed regulations.[33]

Because the EPA established, by subcategorization, a "range" of limitations within the iron and steel regulations and also followed the very procedures sanctioned in *duPont,* such as the employment of a development document and public input, it would appear that the EPA complied with the strictures of the Act. It follows, therefore, that remand of the regulations for development of "range" and "guidance" factors may well be in-

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31. *Id.* —— U.S. at ——, 97 S.Ct. 965.

The observations in *AISI I* respecting the "variance" procedure, *see* 526 F.2d at 1046, have at best limited validity in light of such statements in *duPont*.

32. —— U.S. at —— and note 21, 97 S.Ct. 965.

33. *Id.* —— U.S. at ———— and notes 22, 23, 97 S.Ct. 965.

compatible with the reading of § 304 articulated in *duPont*.[34] At the very least, the requirements that this Court imposed on the EPA to be dealt with on remand cannot be said to be mandatory under the Act.[35]

The question remains, of course, whether the disparity between our opinion in *AISI I* and that of the Supreme Court in *duPont* is such as to warrant recall of the mandate. Despite the efforts of the EPA to fit the present case into the *Greater Boston/Legate* formula, it is questionable whether the *duPont* decision "showed that our original judgment [in *AISI I*] was *demonstrably wrong*."[36] Even so, we do not view the *Legate* test as an immutable rule with which literal compliance is required before a motion to recall may be granted. This is so since *Legate* itself did not involve a factual matrix in which a Supreme Court decision undermined the viability of a prior disposition by the First Circuit. Indeed, the reference to recall of a mandate based on a subsequent Supreme Court opnion constitutes dictum, intended only to demonstrate the natural skepticism with which the court of appeals would view any motion to amend or vacate a prior judgment.

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34. Speaking of the "subcategorization" concept in *AISI I*, this Court declared: "we disagree with the Administrator's contention that 'sub-categorization' provides a range." 526 F.2d at 1046. As to the employment of a development document, this Court did not consider such a procedure as satisfying the dictates of § 301 or § 304. *Id.* at 1046-47 and note 44. But such postulates evidently have become outmoded under *duPont*.

35. It is important to note that the Supreme Court permitted the American Iron and Steel Institute to submit a brief, as *amicus curiae*, in *duPont*. In such brief, the Institute urged the Supreme Court to adopt this Court's position respecting the "range" and "guidance" problems. But it would appear that the Supreme Court rejected, at least implicitly, the position advanced in the amicus brief.

36. *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965).

Although we are inclined to minimize the rigidity of the *Legate* model, the statements in that case remain pertinent to the matter before us. For *Legate* does call attention to the problems generated when the Supreme Court addresses issues that already have been adjudicated in the courts of appeals. Where, as here, a decision of the Supreme Court—the preeminent tribunal in our judicial system—departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former. As noted above, recall of a mandate traditionally has been warranted when and to the extent necessary "to protect the integrity" of a court's earlier judgment.[37] Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a later Supreme Court opinion. Recall of a mandate, in such a situation, would appear to be an appropriate response by a court of appeals.

In the present case, *duPont* places in doubt the necessity of the remand previously ordered and the concomitant requirement that the § 301 and § 304 standards for the iron and steel industry undergo further development. Because the Supreme Court approved the concept of single-number effluent limitations, without ordering separate § 304 guidelines specifying "ranges" and "guidance" factors, the decision in *AISI I*, insofar as it addressed such matters and imposed far more strin-

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37. *See* authorities cited in note 18 *supra*.

gent demands upon the EPA, appears to be at odds with *duPont*. So as to eliminate such variances, and, more importantly, to protect the integrity of our earlier decision, modification of our judgment now seems justified under the unusual circumstances here.

We do not, however, award such relief merely on the basis of the incongruencies between *duPont* and *AISI I*. Additional factors, to be discussed below, support our view that the EPA's "recall" motion should be granted.

B.

Among the hypothetical situations in which recall of a mandate might be proper, *Greater Boston* included instances portending "differences of result for cases pending at the same time." Judge Levinthal declared that the interest in "uniformity" in application of principles and in decision-making might constitute a "special reason for disturbing [the] repose and finality . . ." of an earlier adjudication.[38] While the *Greater Boston* tribunal evidently was concerned with promoting intra-circuit consistency, we believe that the interest in uniformity may transcend the territorial borders of any one circuit. Where a court of appeals finds itself opposed by the asseverations of the majority of its sister courts, then a reevaluation of its own position may be in order. This is especially so where the views of other courts of appeals fall more harmoniously into an alignment with the position of the Supreme Court.

In the situation before us, this Court has assumed a solitary position respecting the "range", "guidance" and related issues. At least five other courts of appeals

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38. 463 F.2d at 278-79.

have considered such questions, and each of them has reached a conclusion opposed to that adopted by this Court.[39] Speaking on the "range" issue, for example, the Second Circuit declined to rule that the effluent limitation regulations were invalid because the "EPA failed to establish permissible 'ranges' of discharges within each category or subcategory of existing point sources . . . ." Rather, that Court stated: "[w]e disagree with this argument and believe that whenever Congress spoke of 'ranges' in the debates over the Act, it meant only the spectrum comprised of varying discharge levels on a subcategorial, rather than individual, basis."[40] And the Supreme Court in *duPont* indicated that such an interpretation is the proper one.

Similarly, the Second Circuit, like the other courts of appeals that have discussed the "guidance" element, spurned the contention that the regulations violated the

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39. *See U.S. Steel v. Train,* 556 F.2d 822 (7th Cir. 1977); *California & Hawaiian Sugar Co. v. EPA,* 553 F.2d 280 (2d Cir. 1977); *American Paper Institute v. Train,* 177 U.S.App.D.C. 181, 543 F.2d 328 (1976); *duPont v. Train,* 541 F.2d 1018 (4th Cir. 1976); *American Petroleum Institute v. EPA,* 540 F.2d 1023 (10th Cir. 1976); *FMC Corporation v. Train,* 539 F.2d 973 (4th Cir. 1976); *American Frozen Food Institute v. Train,* 539 F.2d 107 (D.C. Cir. 1976); *Hooker Chemicals & Plastics Corp. v. Train,* 537 F.2d 620 (2d Cir. 1976).

In *U.S. Steel v. Train, supra,* which was decided after the *duPont case,* the Seventh Circuit briefly commented on the remand for a "range" of effluent limitations ordered in *AISI I*. The Court stated, *inter alia,* that "the Supreme Court's approval of single-number effluent limitations in *duPont* renders [the *AISI I* remand] conclusion questionable . . . ."

40. *Hooker Chemicals & Plastics Corp. v. Train,* 537 F.2d 620, 630 (2d Cir. 1976).

Act by neglecting to specify factors to be taken into account in determining the control measures and practices to be applied to point sources. Basically, the procedures that the EPA employed in setting the single-number effluent limitations were deemed by the Second Circuit to comply with the dictates of § 304 and the Act in general.[41] Again, such a proposition substantially was embraced by the Supreme Court in *duPont*.

In any event, it is clear that the decision of this Court on the "range", "guidance" and related matters departs from the position of the other courts of appeals. The result is a lack of uniformity between the treatment accorded the EPA's effluent limitations in this Circuit and the reception bestowed on such regulations by other courts.

Given such a setting, for this Court to eschew an opportunity to modify the mandate in *AISI I* would prove disruptive to the national program of water pollution control envisioned by the Act. Should we reject the recall motion, the EPA, as it represented at oral argument, would have to proceed to refine its regulations and guidelines as directed in *AISI I*. Once that task was completed, the EPA then would apply the newly developed regulations to the iron and steel industry. However, the EPA would continue to utilize its single-number regulations for other industries—certainly in *all* other circuits where the courts of appeals have rejected "range", "guidance" and similar requirements. Put another way, the pollution control regulations to be applied to categories of similar industrial dischargers would become discordant, with a special set of regulations to govern the iron and steel industry *and*

41. *Id.* 537 F.2d at 630.

perhaps other industrial categories in the Third Circuit alone.

In the face of such a consequence, and especially in view of the apparent inconsistencies between facets of *duPont* and the opinion in *AISI I*, we are willing to accede to the motion to amend the mandate to the extent that it concerns the "range", "guidance" and related issues. In so doing, we adhere to the precept of uniformity in judicial decisionmaking and in the treatment of litigants. Because the interest in avoiding differences in result in cases pending at the same time stands as a valid basis for the recall of a mandate, alteration of the judgment here does not constitute a radically new or unwarranted departure from the strong policy that there be an end to any particular litigation.

C.

Although *Greater Boston* did not designate "the public interest" as a specific reason for granting a "recall" motion, such a concern would seem to be encompassed under the broader rubrics of "good cause" or "special circumstances." The EPA contends that the remand requirements directed in *AISI I*, but not ordered by *duPont*, impose substantial burdens on the agency that will obstruct the effectiveness of the national program of water pollution control. This position is not without merit.

We recognize that development of "ranges", "guidance" factors and the like would constitute a fairly onerous task. As indicated at oral argument, the EPA would have to restructure its methodology for promulgating regulations. In addition, the agency might have to devote substantial manpower in order to satisfy the

remand instructions. The result of expending considerable resources so as to comply with *AISI I* might be to impede effective administration of a wide variety of environmental enactments.

Equally significantly, because of the contours of the mandate in *AISI I,* there presently are no regulations applicable to iron and steel manufacturing operations, a major source of effluent discharges into the waters of the United States. The EPA has advised the Court that the absence of such regulations has contributed to delays in the issuance of discharge permits pursuant to § 402 of the Act.[42] Removal of the stringent remand requirements of *AISI I,* and reinstatement of the effluent limitation regulations as originally designed, would serve to expedite the operation of the permit system. And such action may bolster the accomplishment of the central objective of the legislative draftsmen, *viz.,* "to restore and maintain the chemical, physical and biological integrity of the Nation's waters."[43]

Because of these weighty considerations, coupled with the fact that the remand instructions may be unnecessary in light of the *duFont* adjudication, recall of the mandate here would appear to be justified. Easing the burdens imposed upon the EPA by *AISI I* will serve the public interest by facilitating the enforcement of the national pollution laws. This is so because the agency will be able to direct its limited resources towards a more effective cleanup of our waterways.

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42. 33 U.S.C. § 1342.

43. Section 101 of Act, 33 U.S.C. § 1251.

D.

Another basis for granting the EPA the remedy that it requests rests on the character of the original disposition in this case. *AISI I* did not result in the award of a money judgment or in other relief that was inherently final. Rather, in directing the agency to formulate water pollution standards in compliance with the "range" and "guidance" analysis of *AISI I,* this Court rendered an order which necessarily is of a continuing nature. Since the EPA has not yet devised effluent limitations to comport with *AISI I,* the remand obligations currently remain in force.

It would follow that modification of the extant judgment here would not appear to be particularly violative of the elemental precept, discussed above, that there should be a conclusion to a controversy in litigation.[44] Because *AISI I,* at least prior to completion by the agency of the tasks ordered by this panel, cannot be said to have constituted a final adjudication of the dispute concerning the validity of the challenged regulations, recall of the mandate in the present setting thus is not especially disruptive of the interests in finality of judgments.

Had *AISI I,* for example, awarded a money judgment, we would have been far more reluctant to amend the original mandate. And litigants generally should stand as forewarned that the extraordinary remedy granted here may well be confined to instances where litigants are under a continuing duty to satisfy an order of the Court.

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44. *See* Part II A of this opinion *supra.*

E.

As a final point, we note that the effect on our original judgment of the amendment sought by the EPA will be a relatively modest one. While the decision in *AISI I* constitutes a rather extensive interpretation and analysis of the Act, the EPA seeks to amend or vacate only a minor segment of that lengthy opinion.

Yet the desired modification is not moderate simply in terms of pagination. For, as noted above, we view the vital center of *AISI I* to be the analysis respecting the power of the EPA to promulgate the subject regulations in the first instance. And the motion to recall in no way undercuts—nor could it in light of *duPont*—our conclusion that the EPA possesses the power to design effluent limitation regulations.[45]

Of course, those portions of our opinion that remain intact are largely favorable to the EPA, and so the "recall" motion naturally does not challenge those facets of the *AISI I* opinion. Nonetheless, in light of *duPont* and the decisions of the other courts of appeals respecting the "range", "guidance" and related matters, together with the fact that the *bulk* of our opinion appears to remain viable, we believe that sufficient "good cause" has been evinced to warrant the amendment of our judgment.

IV.

For the reasons articulated in the foregoing opinion, we hold, first, that this Court has the power to re-

45. Additionally, the analysis in *AISI I* regarding the 1977 "BPCTCA" and 1983 "BATEA" standards in the iron and steel regulations as well as the discussion of other contentions raised by the petitioners have not been undermined by *duPont*. *See* 526 F.2d at 1047-66.

call a mandate in certain limited situations. Second, and to dispel any possible doubts, such relief may be granted only in exceptional circumstances and for good cause. Because this Court ordinarily will view motions to recall a mandate with disfavor, the opinion in this matter should not be read as an invitation to litigants to seek review of already adjudicated claims.

Finally, we conclude today that recall of the mandate and modification of the judgment in *AISI I* is warranted because of the *confluence* of several unusual factors: the incongruencies, in certain respects, between the opinion in *AISI I* and the Supreme Court's decision in *duPont*; the solitary position of this Court concerning the "range", "guidance" and related matters, a position contrary to that adopted by every court of appeals that has dealt with the issue; the heavy burdens, contrary to the public interest, that adherence to *AISI I* would impose on the national program of water pollution control; the continuing nature of the obligations placed on the agency in the original panel decision; and the relatively moderate effect of the amendment desired by the EPA on the judgment in *AISI I*.

Accordingly, the original mandate will be recalled and the judgment amended insofar as that judgment remanded the effluent limitation regulations to the EPA (1) to establish "ranges" of effluent limitations other than those established by subcategorization; (2) to specify factors to guide the permit writers in selecting limitations other than the guidance provided by the Development Document and related materials; and (3) to reconsider the effluent limitations as promulgated in light of the "base level" and "ceiling" concepts. Such as amendment of the judgment will not affect any other

portion of the original decision—specifically, it does not concern Sections I and IV through VII of the opinion in *AISI I*. Section VIII of that decision will be affected only to the extent that the Agency's obligations on remand are modified as specified above.

JAMES HUNTER, III, Circuit Judge, dissenting:

The motion before the court was filed March 22, 1977. It seeks (1) recall of the mandate in *American Iron and Steel Institute v. Environmental Protection Agency,* and (2) amendment of judgment.

The case to which the motion has been addressed was decided November 7, 1975. It is reported at 526 F.2d 1027 (3d Cir. 1975).

The moving party here, the Environmental Protection Agency, never filed a petition for rehearing. Furthermore, we have no record of its having petitioned the Supreme Court for certiorari.

On February 23, 1977, the Supreme Court decided *E. I. duPont de Nemours & Co. v. Train,* —— U.S. ——, 97 S.Ct. 965, 51 L.Ed.2d 204 (1977).

The majority permits this court, in the "new" light of *duPont,* to open the door to reconsideration of this case through the recall of the mandate and, additionally, to modify its opinion to "conform" to that recent decision.

I respectfully dissent. I would not attempt to reexamine our 1975 decision because of *duPont*. There must be an end to each individual piece of litigation.[1]

1. *See Baldwin v. Iowa State Traveling Men's Ass'n.,* 283 U.S. 522, 525, 51 S.Ct. 517, 75 L.Ed. 1244 (1931); *Powers v. Bethlehem Steel Corp.,* 483 F.2d 963,

In the instant case that time has long since past.[2] I do not believe that we can have an orderly system of justice if decisions are allowed to be modified or adjusted to "conform" to subsequent decisions of other courts in other cases.

964 (1st Cir. 1973); *Greater Boston Tel. Corp. v. F.C.C.,* 463 F.2d 268, 278 (D.C. Cir. 1971), *cert. denied* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972); *Collins v. City of Wichita, Kansas,* 254 F.2d 837, 839 (10th Cir. 1958).

2. *See Riha v. International Tel. & Tel. Corp.,* 533 F.2d 1053, 1055 (8th Cir. 1976); *Lee v. Terminal Transport Co.,* 301 F.2d 234, 236 (7th Cir. 1962).

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ON PETITIONS FOR REVIEW OF AN ORDER OF
THE ENVIRONMENTAL PROTECTION AGENCY

Present: ADAMS, HUNTER and GARTH,
Circuit Judges.

AMENDED JUDGMENT ON MOTION FOR
RECALL OF MANDATE

On consideration whereof, it is now here ordered and adjudged that the certified judgment issued, December 1, 1975, in lieu of formal mandate be, and the same is hereby recalled and the judgment of this Court, filed November 7, 1975, be, and the same is hereby amended insofar as that judgment remanded the effluent limitation regulations to the EPA (1) to establish "ranges" of effluent limitations other than those established by subcategorization; (2) to specify factors to guide the permit writers in selecting limitations other than the guidance provided by the Development Document and related materials; and (3) to reconsider the effluent limitations as promulgated in light of the "base level" and "ceiling" concepts. Such an amendment of the judgment will not affect any other portion of the original decision—specifically, it does not concern Sections I and IV through VII of the opinion in *AISI I*. Section VIII of that decision will be affected only to the extent that the

Agency's obligations on remand are modified as specified above, all in accordance with the opinion of this Court.

ATTEST:
THOMAS P. QUINN
Clerk

August 10, 1977

Certified as a true copy and issued in lieu of a formal mandate on September 13, 1977.
Test: M. Elizabeth Ferguson

Chief Deputy Clerk, U.S. Court of Appeals for the Third Circuit

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Appendix C.

Appendix C

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 74-1640, 74-1642, 74-1962, 74-2006, 74-2256

AMERICAN IRON AND STEEL INSTITUTE, et al.
v.
ENVIRONMENTAL PROTECTION AGENCY

SUR PETITION FOR REHEARING
BY ORIGINAL PANEL

Present: ADAMS, HUNTER and GARTH,
Circuit Judges.

The petition for rehearing filed by Petitioners in the above entitled case having been submitted to the judges who participated in the decision of this court, and no judge who concurred in the decision having asked for rehearing, the petition for rehearing is denied.

By the Court,

.....
Circuit Judge

Dated: September 2, 1977

Appendix D.

Appendix D

AMERICAN IRON AND STEEL INSTITUTE, et al.,
Petitioners.
v.
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

Nos. 74-1640, 74-1642, 74-1962, 74-2006 and 74-2256.
United States Court of Appeals, Third Circuit.
Argued June 9, 1975.
Decided Nov. 7, 1975.

Before ADAMS, HUNTER and GARTH, Circuit Judges.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This is a petition brought by the American Iron and Steel Institute and several individual steel companies to review regulations promulgated by the Administrator of the Environmental Protection Agency on June 28, 1974.[1] In these regulations, entitled "Effluent Guidelines and Standards, Iron and Steel Manufacturing Point Source Category," the Administrator established nationwide single number effluent limitations for point sources[2] in the iron and steel industry engaged in "pri-

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1. 39 Fed.Reg. 24114, 40 C.F.R. § 420.10 et seq.

2. 33 U.S.C. § 1362(14) defines "point source" as "any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged."

mary" (or basic manufacturing) operations.[3] Contending that the Administrator's regulations do not conform to the requirements of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter, the "Act"),[4] the petitioners seek judicial review of the Administrator's actions under section 509(b)(1) of the Act.[5] Two other steel companies—Youngstown Sheet and Tube Company, and CF&I Steel Corporation—filed similar petitions in the Sixth and Tenth Circuits, respectively. By order of each Circuit, the cases were transferred to this Court, and they have been consolidated with the petitions filed here. In addition, the Natural Resources Defense Council, Inc., has filed a brief as Amicus Curiae.

I

Petitioners' first, and most basic, challenge is to the Administrator's very power to promulgate nationwide single number effluent limitations for existing point sources.[6] Petitioners contend that the limitations which are to be binding on them can only be established by the permit-granting authorities (principally, the States), which are to follow *guidelines* promulgated by the Administrator. The Administrator contends that he is not

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3. Regulations for "secondary" (or finishing) operations have not yet been promulgated.

4. 33 U.S.C. § 1251 et seq. (Supp. II 1972). The relevant sections of the Act are set out in full in the appendix to this opinion.

5. 33 U.S.C. § 1369(b)(1).

6. The power of the Administrator to establish such limitations for *new* point sources under § 306 of the Act, 33 U.S.C. § 1316, is unquestioned. Thus, petitioners' challenge to the new source regulations, discussed in parts VI and VII of this opinion, takes a different approach.

merely empowered to promulgate guidelines, but may establish *limitations* which are binding throughout the country and which must be incorporated into any permit issued to any individual point source. The answer to this dispute, which goes to the very heart of the administration of the Act, depends upon our resolution of the interrelationship of three key sections of the Act—301,[7] 304[8] and 402.[9]

Petitioners rely heavily on the fact that there is no section in the Act which explicitly authorizes the Administrator to establish single number effluent limitations for existing point sources. They contend that the lack of such explicit authorization cannot have been an oversight, since the Act expressly authorizes the Administrator to promulgate other types of regulations. For example, the Administrator has the explicit authority to set standards for new point sources under section 306(b)(1)(B)[10] and for toxic discharges under section 307(a)(2),[11] and to establish pretreatment standards under section 307(b)[12] and water quality standards under section 303(b).[13] Many of these sections not only explicitly authorize the Administrator to promulgate regulations establishing such standards, but also specify in some detail the times and procedures to be followed.

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7. 33 U.S.C. § 1311.
8. *Id.* § 1314.
9. *Id.* § 1342.
10. *Id.* § 1316(b)(1)(B).
11. *Id.* § 1317(a)(2).
12. *Id.* § 1317(b).
13. *Id.* § 1313(b).

In contrast to these sections, the only section explicity authorizing the Administrator to establish any regulations pertaining to effluent standards for existing point sources—section 304(b)—merely authorizes the promulgation of "guidelines" rather than precise standards or single number limitations. While section 301(b) refers to "effluent limitations" for existing point sources, that section does not explicitly authorize the Administrator (or anyone else) to promulgate regulations establishing such limitations. Rather, using the passive voice, that section merely states that effluent limitations for such point sources "shall be achieved" by July 1, 1977 through the application of the "best practicable control technology currently available" (hereinafter, "BPCTCA"), and by July 1, 1983 through the application of the "best available technology economically achievable" (hereinafter, "BATEA"). Under petitioners' construction of the Act, these effluent limitations are to be "achieved" through the permit process. They contend that the permit issuing authorities, under section 402, are to determine the effluent limitations to be achieved by applying, to individual point sources, the factors enumerated in the guidelines previously promulgated by the Administrator under section 304(b).

The two consolidated cases present graphic examples of the differing consequences of the two interpretations. Both Youngstown and CF&I contend that they have local problems which can be fully appreciated only by a local permit-issuing authority. Youngstown claims that its plants in the Mahoning Valley provide one third of the direct employment in that area and that they are indirectly responsible for a significant percentage of the remaining jobs. It also claims that its plants are very old (several were built before World War I), that many

will be forced to close if the limitations promulgated by the Administrator are enforced, and that because of the heavy concentration of steel plants along the shores, the river is unavailable for recreational uses anyway. Youngstown claims that a local authority, in appreciation of these factors, might have required somewhat less stringent controls. CF&I points to a different problem. It contends that the installation of anti-pollution devices in its Colorado plants would cause a significant net loss of water through evaporation, which would have serious consequences in a state where water is a scarce and valuable resource. Contending that only a local authority would fully appreciate the impact of the anti-pollution devices on scarce water resources,[14] CF&I argues that its case is another illustration of the necessary for flexibility at the local level.

We acknowledge that these arguments are not without force, but we believe that the Administrator does have the authority to promulgate effluent limitations under section 301. While we admit that Congress did not express its intent on this point with particular clarity, we conclude, after examining the entire statutory scheme and the legislative history, that the Administrator's power to promulgate effluent limitations under section 301 can be inferred.[14a] We thus respect-

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14. It is undisputed that the Administrator did not even consider this evaporation problem. But see Part IV(c) of this opinion.

14a. See part I of Judge Adams' opinion in which Judge Garth and I join. As part I of that opinion aptly notes, Congress' failure to express more clearly its intent on such a crucial matter is indeed disturbing and we hope that Congress will heed our admonition to draft its legislation with greater clarity. The admitted ambiguities in

fully disagree with the contrary conclusion reached by the Eighth Circuit in *CPC International, Inc. v. Train,* 515 F.2d 1032 (8th Cir. 1975). With respect to the peculiarly local problems of some point sources, as illustrated by Youngstown and CF&I, we believe that our holding that the Administrator does have power under Section 301 does not preclude some flexibility at the local level. This point will be addressed in detail in part II of this opinion.

Perhaps the strongest indication in the Act that the Administrator has the power under section 301 to promulgate effluent limitations can be found in section 509(b)(1). This section provides for judicial review "of *the Administrator's action* . . . (E) in approving or *promulgating any effluent limitation* or other limitation *under section 301* . . . and (F) in issuing or denying any permit under section 402." Not only does this section explicity refer to the Administrator's action in promulgating a section 301 effluent limitation, but its separate references, in subsections (E) and (F), to section 301 effluent limitations and section 402 permits indicates that the limitations and permits have independent significance.

The Eighth Circuit in *CPC International* discounted the importance of section 509(b)(1)(E) by contending that the section 301 limitation referred to must be one promulgated under section 301(c), which empowers the Administrator to "modify the requirements of subsection (b)(2)(A) of this section" with respect to an in-

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this Act, however, cannot be an excuse to avoid deciding the case before us, and we are satisfied that our resolution of the Act's ambiguities is the one most consistent with Congress' expressed intent.

dividual plant upon a stringent showing of hardship and good faith efforts at compliance. We cannot accept the Eighth Circuit's reasoning on this point. In the first place, section 301(c) does not authorize the Administrator to *promulgate* any effluent limitations. Rather, it merely authorizes him to *relax* the requirements of section 301(b) with respect to 1983 "BATEA" standards,[15] and thus it cannot be read to be within the scope of section 509(b)(1)(E). Furthermore, the legislative history shows quite clearly that section 301(c), which was only added during the House-Senate Conference, did not even exist at the time section 509(b)(1)(E) was originally drafted.[16]

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15. In fact, § 301(c) itself seems to support the Administrator's position by presupposing the existence of a section 301 effluent limitation which the Administrator can relax. Petitioners, noting that § 301(c) empowers the Administrator to "modify the *requirements*" of § 301(b)(2)(A), contend that this merely means that the Administrator may relax the requirement that "BATEA" technology be used. However, it is clear from Senator Muskie's statement in support of the Conference bill that Congress contemplated the relaxation of *limitations:*

> "The Conferees have provided, however, a mechanism for individual point-source-by-source consideration in section 301(c). That section provides that the Administrator may modify any effluent *limitation* based on 'best available technology' to be achieved by July 1, 1983 . . . [Emphasis added]."

Environmental Policy Division of the Library of Congress, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess. (Comm. Print 1973), at 1972 [hereinafter, "Leg.Hist."].

16. In the original Senate bill, S. 2770, § 509(b)(1) contained essentially the same language it does now [see Leg.Hist. at 1713], while § 301(c) was what is now §

Further support for the Administrator's power can be found in section 505,[17] which permits citizen suits to enforce compliance with the Act. Section 505(a)(1) permits such suits against any person "who is alleged to be in violation of (A) an effluent standard or limitation under this Act. . . ." Section 505(f) defines "effluent standard or limitation," for purposes of section 505(a), as ". . . (2) an effluent limitation or other limitation under section 301 . . .; or (6) a permit or condition there-

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301(d), and no subsection in § 301 contained what is now § 301(c) [see Leg.Hist. at 1610]. It is clear that what is now § 301(c) was added during the House-Senate Conference. See Leg.Hist. at 172 and 304.

We also see no merit to petitioners' contention, advanced in their Reply Brief, that the initial bill's distinction between the Administrator's actions having a national impact and those having a local impact, the former to be reviewable in the District of Columbia Circuit and the latter in the Circuit of the affected locality, somehow is support for their position that effluent limitations can only be established locally. To the extent that Congress ever intended that, this view would seem hard to reconcile with enacted version of section 509, which draws no distinction between "national" standards and "local" effluent limitations. Furthermore, even if Congress had considered § 301 limitations to have a local impact, in contrast to unspecified "federal standards," the earlier version of § 509 still provided for judicial review "of the *Administrator's action* in approving or *promulgating*" section 301 limitations. The fact that Congress may have thought that the *impact* was local does not mean that the Administrator does not have the power to promulgate such limitations. Congress may instead have recognized that some "national" limitations may have a predominantly local impact on those industries which are concentrated primarily in one region of the country.

17. 33 U.S.C. § 1365.

of issued under section 402 of this Act . . .."[18] If petitioners' view were correct—that effluent limitations required under section 301 can only be established through the permit process under section 402—then subsections (2) and (6) of section 505(f) would appear redundant. The fact that Congress felt it necessary to include separate references to section 301 limitations and to section 402 permits indicates that they have independent significance and that a person could be in violation of section 301(b) independently of section 402.

Petitioners attempt to explain away this redundancy by arguing that the separate references merely indicate that "the legislative draftsmen appreciated that a § 402 permit condition is not always an effluent limitation—it might be a monitoring or reporting requirement." This contention fails to eliminate the redundancy, and it fails to explain why Congress did not consider it sufficient to include only a reference to a violation of a section 402 permit. While a permit may contain conditions other than section 301 limitations, petitioners' position is that a section 301 limitation can only be established through the permit process. Thus, given the reference to violations of section 402 permits, any reference to violations of section 301 limitations would still be superfluous under petitioners' view.

The Eighth Circuit in *CPC International* attempted to explain away the redundancy on a different ground. It viewed the independent reference to section 301 as

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18. The Senate Report states, with reference to section 505, that "[i]n addition to violations of Section 301(a), citizens are granted authority to bring enforcement action for violations of effluent limitations under section 301 . . . and any condition of any permit issued under section 402." Leg.Hist. at 1500.

being necessary to encompass section 301(f), which prohibits the discharge of radiological, chemical, or biological warfare agents and high-level radioactive wastes into navigable waters. However, section 301(f) is not an "effluent limitation," but rather a flat prohibition on all such discharges. Section 301(b) is the part of section 301 which requires compliance with *effluent* limitations, and section 301(f) would seem to be a type of "other limitation" referred to in section 505(f)(2).

Section 401(a)(1)[19] also lends support to the Administration's position. This section requires an applicant for a permit to provide the permit-issuing agency with "a certification from the State . . . that any such discharge will comply with the applicable provisions of sections 301, 302, 306, and 307 of this Act." The section then proceeds to state:

> "In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 301(b) and 302, and there is not an applicable standard under sections 306 and 307, the States shall so certify . . .."

This section, by requiring the State to certify the *absence* of a section 301 effluent limitation when someone has applied for a permit, seems to presuppose that section 301 limitations have an existence independent of the section 402 permits, and that they are generally expected to have been promulgated prior to the issuance of such permits.

There are a number of other sections in the Act which refer to the establishment of effluent limitations "under" or "pursuant to" section 301. While it is true

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19. 33 U.S.C. § 1341(a)(1).

that none of these sections specify *how* these limitations are to be established or *who* is expected to establish them, the repeated references to such limitations, when coupled with the complete absence of any qualification that such limitations are to be established through the permit process, is further support for the position that Congress intended the section 301(b) limitations to have an independent existence. If they are to have such an independent existence, it is reasonable for the Administrator to conclude that the promulgation of regulations establishing such limitations is within his inherent rule-making power.[20] Those sections containing references to effluent limitations include section 301(e) ["Effluent limitations established pursuant to this section"]; section 302(c)[21] ["The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 301 or section 306 of this Act"]; section 316(b)[22] ["any standard established pursuant to section 301"]; and section 316(c)[23] ["effluent limitations established under section 301"].

Finally, we believe that a joint reading of sections 304 and 301 lends support for the Administrator's position and undercuts that of the petitioners. Sections 304(b)(1)(A) and 304(b)(2)(A) require that the Administrator's regulations, which are to be applicable by the years 1977 and 1983, respectively, "*identify* . . . the

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20. See § 501(a), 33 U.S.C. § 1361(a), which provides: "The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under the Act."

21. 33 U.S.C. § 1312(c).

22. *Id.* § 1326(b).

23. *Id.* § 1326(c).

degree of effluent reduction *attainable*" through application of the best technology practicable or available. This meshes in very neatly with section 301(b), which requires the "achievement" of effluent limitations by those dates applying the same respective levels of technology. Reading the two sections together, it would seem inconsistent to require, on the one hand, both the achievement of effluent limitations applying certain levels of technology [section 301(b)] and the promulgation of regulations by the Administrator which "identify . . . the degree of effluent reduction attainable" through those levels of technology [section 304(b)], while at the same time allowing permit grantors to determine for themselves, bound only by section 304(b) guidelines, what levels of effluent limitation are to be achieved.

The Eighth Circuit in *CPC International* relied in part on the permit provisions of the Act, especially section 402(d)(2), which provides:

> "No permit shall issue . . . if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permits as being outside the guidelines and requirements of this Act."

The Eighth Circuit, emphasizing the phrase "as being outside the guidelines," concluded that "[i]t is hard to imagine a clearer indication that the permit-issuing authority is to follow the guidelines promulgated under § 304(b), and is not to refer to independent regulations under § 301." We respectfully disagree, and believe that the Eighth Circuit read too much into section 402(d)(2). Even if the word "guidelines" is a specific reference to the section 304(b) guidelines, the Eighth Circuit's emphasis on that word ignores the fact that the permit grantors must also comply with the "requirements" of the Act. In section 402(b)(1)(A), the Act requires that any permits issued "apply, and insure compliance with, any applicable requirements of sections *301*, 302, 306, 307 and 403." Section 304, unlike section 301, is never explicitly mentioned in section 402. We thus read the whole of section 402 as requiring compliance both with section 301 limitations and with any guidelines promulgated by the Administrator.

We also believe that a close reading of the legislative history supports the Administrator's position. The Senate Report accompanying the bill stated:

> "It is the Committee's intention that *pursuant to subsection 301(b)(1)(A)*, and Section 304(b) the *Administrator* will interpret the term 'best practicable' when applied to various categories of industries as a basis for *specifying* clear and precise effluent *limitations* to be implemented by January 1, 1976."[24]

Virtually identical language was used by Senator Muskie, the principal author of the bill, in explaining the Report of the House-Senate Conference Committee.[25]

Senator Bentsen, a member of the Senate Public Works Committee which drafted the bill, gave perhaps the clearest indication that Congress contemplated that the Administrator would establish section 301 limitations:

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24. Leg.Hist. at 1468 (emphasis added). The bill as enacted, of course, had a date of July 1, 1977 instead of January 1, 1976.

25. Leg.Hist. at 169.

> "In phase I, for point sources of pollutants, effluent limits shall be established not later than January 1, 1977 [now July 1, 1977], which comply with specifically defined levels of effluent controls and treatment. As defined in section 301(b)(1) of the bill, and as elaborated in *the regulations which we anticipate the Administrator shall issue pursuant to section 301* and section 304, these 1976 [now 1977] goals shall be at least . . . the 'best practicable control technology currently available' for [industrial] point sources. . . ."[26]

The petitioners, as did the Eighth Circuit in *CPC International*, also rely on portions of the legislative history as support for their interpretation, but we believe that a close reading of the parts on which they rely does not contradict our analysis. Many of the statements indicating the need for flexibility, precise federal guidelines and a meaningful state role do not prove that the Administrator does not have the power to establish limitations under section 301. As we shall explain in greater detail in part II of this opinion, they merely indicate that the Administrator was empowered to promulgate guidelines in addition to limitations. Furthermore, some of the legislative history relied on by petitioners is ambiguous. One example is the following exchange between Senator Mathias and Senator Muskie:

> "Mr. Mathias. Does section 301(b)(2)(A) on page 76 contemplate that a State, or the Administrator if appropriate, might be able to set the 1981 [now 1983] effluent limitations almost on an individual point source by point source basis?

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26. *Id.* at 1283 (emphasis added).

> "Mr. Muskie: Section 301(b)(2)(A) as well as section 301(b)(1) anticipate individual application on point sources through the procedures under the permit program established under section 402."[27]

Unlike the petitioners, we do not see Senator Muskie's answer as support for the view that section 301 effluent limitations can only be *established* through the permit process. Rather, it is fully consistent with the Administrator's position that previously promulgated nationwide effluent limitations are to be *applied* to individual plants through the permit process. Given the question asked, his answer must be taken primarily as a denial that the Administrator was to set limitations on a plant-by-plant basis, not that he lacked the authority to establish *nationwide* limitations. He merely indicated that those limitations were to be *applied* by local authorities on a local basis.

The strongest statement in support of the view that effluent limitations were to be *established,* as well as applied, through the permit process appears in a letter from EPA Administrator William Ruckelshaus to Chairman Blatnik of the House Public Works Committee:

> "Effluent limitations required by Section 301 would be established and applied to all point sources of discharges covered by the Act by means of permits issued under Title IV." [28]

We believe that this statement should not be given great weight. This Act was predominantly a congressional product, with the Administration playing a relatively insignificant rule in its drafting, at least with respect

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27. *Id.* at 1391.
28. *Id.* at 844.

to those parts of the Act at issue here. Consequently, we believe that the comments by the EPA Administrator reflecting his interpretation of then pending legislation should be given less weight in determining the meaning of the Act than statements by Senators such as Muskie and Bentsen who had a far greater responsibility for the Act's drafting.

The Eighth Circuit in *CPC International* also relied heavily on the fact that several Representatives, principally Abzug and Rangel, were concerned about the lack of a federal veto power over the permit grantors in the early House version of the bill.[29] The Eighth Circuit concluded that "the creation of the veto power would make no sense if the EPA was already empowered to promulgate regulations under § 301." We disagree. We believe that a veto power could have been considered just as necessary to ensure compliance by the permit grantors with section 301 limitations as with section 304 guidelines.

As a final point, we note that the Supreme Court has consistently stated that, where an Act of Congress is fairly susceptible of differing constructions, the interpretation made of it by the agency charged with its administration should be given considerable deference. *Udall v. Tallman,* 380 U.S. 1, 16-18, 85 S.Ct. 792, 13 L.Ed. 2d 616 (1965); *Power Reaction Co. v. Electricians,* 367 U.S. 396, 408, 81 S.Ct. 1529, 6 L.Ed.2d 924 (1961); *McLaren v. Fleischer,* 256 U.S. 477, 480-81, 41 S.Ct. 577, 65 L.Ed. 1052 (1921). This position was most recently reiterated in *Train v. NRDC,* 421 U.S. 60, 87, 95 S.Ct. 1470, 43 L.Ed.2d 731 (1975), where the Supreme Court,

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29. Such a veto power was eventually provided in section 402(d)(2), 33 U.S.C. § 1342(d)(2).

in upholding the Administrator's interpretation of section 110 of the Clean Air Act,[30] stated:

> "We therefore conclude that the Agency's interpretation of §§ 110(a)(3) and 110(f) was 'correct' to the extent that it can be said that any particular interpretation of a complex statute such as this is the 'correct' one. Given this conclusion, as well as the facts that the Agency is charged with administration of the Act, and that there has undoubtedly been reliance upon its interpretation by the States and other parties affected by the Act, we have no doubt whatever that its construction was sufficiently reasonable to preclude the Court of Appeals from substituting its judgment for that of the Agency."

Similarly, the Supreme Court also stated:

> "Without going so far as to hold that the Agency's construction of the Act was the only one it permissibly could have adopted, we conclude that it was at the very least sufficiently reasonable that it should have been accepted by the reviewing courts."[31]

For the reasons expressed earlier, we believe that the Administrator's interpretation of this very complex Act—at least with respect to his power to promulgate effluent limitations under section 301—is the more reasonable one, and should be given appropriate deference.[32]

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30. 42 U.S.C. § 1857c-5.

31. 421 U.S. at 75, 95 S.Ct. at 1479.

32. We also reject the argument made by Youngstown that differing language in §§ 301(b)(1)(A) and 301(b)(2)(A) indicates that the administration of the Act differs as between 1977 and 1983 limitations. Noting that § 301(b)(1)(A) requires the achievement of "effluent limitations for point sources," whereas § 301(b)(2)

II

Having concluded that the Administrator does have the power to promulgate effluent limitations under section 301, we are now faced with the question of interpreting the nature of the Administrator's powers and duties under section 304 and of reconciling our construction of section 304 with that of section 301. We begin by observing that the Administrator not only has the power, but the explicit obligation to promulgate "guidelines" under section 304. In these guidelines, the Administrator is specifically required (1) to "identify . . . the degree of effluent reduction attainable through the application" of the relevant standard of technology [sections 301(b)(1)(A) and 301(b)(2)(A)], *and* (2) to "specify factors *to be taken into account* in determining the control measures and practices *to be applicable to point sources . . . within such categories or classes*" [section 304(b)(1)(B)][33] (emphasis added). This second requirement clearly contemplates that the guidelines promulgated by the Administrator on the basis of broad

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(A) requires the achievement of "effluent limitations for *categories and classes* of point sources," Youngstown appears to argue that the 1983 limitations can only be established on a category or class basis while conceding that they can be established on an individual basis for 1977. However, we see nothing in the legislative history indicating that the regulatory scheme was to be so radically different as between the 1977 and 1983 limitations. Furthermore, it makes little sense to have the limitations applied on a point source by point source basis in 1977, while permitting limitations on a category-wide basis six years later. We thus conclude that any ambiguity created by §§ 301(b)(1)(A) and 301(b)(2)(A) on this point was inadvertent and was a result of imprecise legislative drafting.

33. Substantially similar language is included in section 304(b)(2)(B), pertaining to guidelines for 1983 standards.

categories or classes of industries are to provide guidance to those authorities (presumably, the permit grantors) which determine the precise degree of effluent control required of any individual point source. The only other interpretation possible would be that the Administrator is required to promulgate guidelines for broad categories or classes which are to guide *himself* in setting precise limitations for specific point sources—clearly an illogical interpretation, and, as noted below, one which is contrary to the clearly expressed congressional intent that the Administrator is not to consider the particular circumstances of individual point sources.

Sections 304(b)(1)(B) and 304(b)(2)(B) also specify a number of factors to be taken into account in determining the control measures required for compliance with the respective 1977 and 1983 technological standards. These factors include cost, the age of the equipment and facilities involved, engineering aspects of application of various types of control techniques, and non-water quality environmental impact. The first question to address is who is to consider these factors —the Administrator in promulgating the guidelines, or the permit grantors in applying the guidelines to individual point sources? The statute is somewhat ambiguous on this point. By listing the various "factors" in sections 304(b)(1)(B) and 304(b)(2)(B) immediately after stating that the guidelines are to "specify factors to be taken into account," Congress would appear to have intended that these were factors to be considered by those authorities applying the guidelines to individual point sources within the categories outlined by the Administrator. On the other hand, the statute states that these are factors "relating to the assessment" of the relevant technology, and sections 304(b)(1)(A) and

304(b)(2)(A) state that the *Administrator* is required to "identify . . . the degree of effluent reduction attainable through the application" of the relevant level of technology. This suggests that the factors are ones to be considered by the Administrator in "assessing" the proper level of technology.

The legislative history, however, indicates quite clearly that a full consideration of these factors at the permit-issuing stage was not intended. In Senator Muskie's statement in support of the bill as approved by the House-Senate Conference Committee, he explained:

> "The Conferees intend that the factors described in Section 304(b) be considered only within classes or categories of point sources and that such factors not be considered at the time of the application of an effluent limitation to an individual point source within such category or class."[34]

Similarly, Representative Dingell, in discussing one of the factors ("cost") enumerated in section 304(b), stated:

> "The conference report emphasizes on page 121 a very important point. The report states:
>
> 'The conferees intend that the Administrator or the State, as the case may be, will make the determination of the economic impact of an effluent limitation on the basis of classes and categories of point sources, as distinguished from a plant by plant determination.'
>
> "Thus, a plant-by-plant determination of the economic impact of an effluent limitation is neither

34. Leg.Hist. at 172.

> expected, nor desired, and, in fact, it should be avoided."[35]

Nevertheless, it does appear that Congress contemplated that some degree of consideration of the enumerated factors was to be made by the permit grantors on a plant-by-plant basis. The Senate Report, after referring to the section 304(b) factors, stated:

> "In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant."[36]

At first glance, this statement seems hard to reconcile with the previously quoted statements indicating that the factors were not to be considered on a plant-by-plant basis. We note, however, that the Senate Report just quoted said that the factors were to be "applied," not that they were to be "considered." We therefore believe that the statements quoted can be reconciled if we determine that any "consideration" to be given the specified factors by the permit grantors should be considerably less than *de novo*. Thus, it seems that the Administrator is to conduct the primary consideration of the enumerated factors for classes and categories and is to specify to the permit grantors how some variation in the standards should be made in light of those factors. In other words, the permit grantors are to have a limited and carefully circumscribed discretion to take into account factors as specified by the Administrator. To hold that they have no discretion does not make sense in light of the clear command in section 304(b)(1)(B) that the "guidelines" promulgated by the Administrator

35. *Id.* at 254-55.

36. *Id.* at 1468.

"specify factors *to be taken into account* in determining the control measures and practices to be applicable *to point sources . . . within such categories and classes.*" Nor would it make any sense in light of the very fact that the permit grantors are to be guided by "guidelines." Finally, it would be inconsistent with Congress' concern that the guidelines provide precise guidance. As Senator Muskie stated:

> "Except as provided in Section 301(c) of the Act, the intent is that effluent limitations applicable to individual point sources be as uniform *as possible*. The Administrator is expected to be precise *in his guidelines* so as to assure that similar characteristics, regardless of their location or the nature of the water into which the discharge is made, will meet similar effluent limitations."[37]

This indicates to us that, while uniformity was clearly a major congressional concern, some amount of local variation, carefully circumscribed by precise guidelines, was contemplated. In short, uniformity was to be achieved by effluent standards within a given category which were similar, rather than identical or unitary.[38]

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37. *Id.* at 172.

38. As the Eighth Circuit in *CPC International* stated, "[t]his preoccupation with the precision of the guidelines as a means of achieving uniformity makes no sense in a regime where the permit-issuing authorities are to look, not to the guidelines, but to regulations promugated under § 301." Where we disagree with the Eighth Circuit is its conclusion that the permit grantors were not also constrained by § 301 limitations. As explained below, we conclude that they are bound to follow both § 301 limitations *and* §304 guidelines.

This conclusion is further buttressed by several indications in the legislative history that the guidelines were intended to provide permissible "ranges" of effluent limitations. With respect to the 1977 "BPCTCA" standards the Senate Report, for example, stated:

> "The Administrator should establish the *range* of best practicable levels based upon the average of the best existing performance by plants of various sizes, ages, and unit processes within each industrial category."[39]

With respect to the 1983 "BATEA" standards, the same Report continued:

> ". . . [T]he Committee intends that effluent limitations be based upon application of best available technology as defined by the Administrator. In making the determination of 'best available' the Committee expects the Administrator to apply the same principles involved in making the determination of best practicable as outlined above except that rather than the *range* of levels established in reference to the average of the best performers in an industrial category the *range* should at a minimum be referenced to the best performer in any industrial category."[40]

Similarly, Senator Muskie, in summarizing the bill as reported out of the House-Senate Conference, stated:

> "The Administrator should establish the *range* of best practicable levels based upon the average of the best existing perforance by plants of various

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39. Leg.Hist. at 1468 (emphasis added).

40. *Id.* (emphasis added).

sizes, ages, and unit processes within each industrial category."[41]

Having concluded that the local permit-issuing authorities have a carefully circumscribed degree of discretion, as evidenced by Congress' concern that the Administrator's guidelines "specify factors to be taken into account" and that they provide "ranges," we are then faced with the problem of reconciling this limited amount of discretion with out previous conclusion that the Administrator has the power to promulgate effluent limitations under section 301. The answer, in our view, lies in the fact that Congress clearly contemplated that there was to be a uniform "ceiling" which no polluter would be permitted to exceed. The key to understanding the interrelationship between sections 301 and 304 can, we believe, be found in the following excerpt from the Senate Report:

> "In defining best practicable for any given industrial category, the Committee expects the Administrator to take a number of factors into account. These factors should include the age of plants, their size and the unit processes involved and the cost of applying such controls. In effect, for any industrial category, the Committee expects the Administrator to define a *range* of discharge levels, *above a certain base level applicable to all plants within that category*. In applying effluent limitations to any individual plant, the factors cited above should be applied to that specific plant. *In no case, however, should any plant be allowed to discharge more pol-*

41. *Id.* at 169 (emphasis added).

> *lutants per unit of production than is defined by that base level."*[42]

In our view, the section 301(b) limitations represent a single number effluent limitation which prescribes the minimum amount of control (the "base level"), or conversely, the maximum amount of effluent discharge (a "ceiling") that is permissible. In determining this "base level," and concomitant pollutant ceiling, the Administrator is to consider the numerous differences in processes and capabilities of point sources.[42a] Having determined the "base level," and the "ceiling," he must then promulgate guidelines which are to guide the permit-issuing authorities in deciding whether, and by how much, the limitation to be applied to any individual point source is *more* stringent than the base level (in terms of requiring more effective technology), and more stringent than the ceiling (in requiring a lower amount of effluent discharge). Thus, we reconcile sections 301 and 304 in the following manner: the section 301 limitations represent both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge(permissible nationwide within a given category, and the section 304 guidelines are intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of dicharge that is more stringent than the ceiling.

42. *Id.* at 1468 (emphasis added).

42a. While Congress used the term "base level," henceforth in our discussion of limitations we will refer to a *ceiling* of effluent discharge which the polluter cannot exceed, since we believe that the latter term more clearly expresses Congress' intent.

III

We now turn to the regulations being challenged to see if they comply with our interpretation of the statutory scheme. It is immediately apparent that the regulations establish only single number effluent limitations for each of twelve subcategories within the iron and steel industry.[43] While the regulations comply with the requirement in sections 304(b)(1)(A) and 304(b)(2)(A) that they "identify . . . the degree of effluent reduction attainable" through application of the relevant standard of technology ("BPCTCA" or "BATEA"), they do not specify any factors to be taken into account in determining the control measures to be applied to individual point sources within the categories and classes, as required by sections 304(b)(1)(B) and 304(b)(2)(B). Furthermore, they do not specify permissible "ranges" of limitations below the ceiling.

The Administrator, however, contends that he satisfied these requirements. In the regulations themselves, he states:

> "The Agency considers that the limitations already represent ranges, taking into account differences in processes used and other factors. Subcategorization has been used to take these factors into account with different limitations for each subcategory. Within subcategories, exceptions to the limitations have been provided where appropriate, thus constituting a range. Each numerical limitation represents a maximum value over a given period of time. This, in effect, represents a range from zero up to the specific limitation." 39 Fed.Reg. 24117 (comment # 25).

43. Those twelve subcategories are: by-product coke, beehive coke, sintering, blast furnace (iron), blast furnace (ferromanganese), basic oxygen furnace (semi-wet air pollution control methods), basic oxygen furnace (wet methods), open hearth furnace, electric arc furnace (semi-wet methods), electric arc furnace (wet methods), vacuum degassing, and continuous casting.

We believe that this response is insufficient. We do not agree that the "exceptions" referred to satisfy the "range" requirement, since only one of the twelve subcategories—By-Product Coke—contains any such exception. The statement that a range exists from zero up to the limitation is unsupportable since for all of the subcategories the Administrator concluded, with respect to the new source standards, that a "zero discharge" level was not feasible at this time. Thus, the "range" admittedly encompasses standards that cannot be met. More important, the regulations provide absolutely no guidance to the permit-issuing authorities as to what factors to consider or how to set the particular discharge level within a feasible range below the ceiling established under Section 301(b). Finally, we disagree with the Administrator's contention that "sub-categorization" provides a range. The Administrator's subcategorization merely divided the entire iron and steel making industry by means of the types of processes employed, and it does not reflect any of the innumerable differences within the particular subcategories. No guidance is given by respect to the remaining section 304(b) factors, such as age, costs and engineering aspects, which we previously concluded must be "specified" in order to guide the permit grantors in exercising their carefully circumscribed discretion in setting precise standards for individual point sources.

The Administrator contends that sufficient flexibility in the regulations is provided through the "variance"

procedure, which allows individual discharges to obtain variances from the limitations upon a showing that the factors relevant to a particular point source are "*fundamentally different* from the factors considered in the establishment of the guidelines." Our responsibility, however, is not to determine whether the Administrator has provided for flexibility, but whether he has followed the statutory scheme established by Congress. Regardless of whether the establishment of a variance procedure is within the Administrator's discretion, we do not believe that the Administrator can ignore his obligation to promulgate guidelines specifying factors to be considered and ranges above a base level. We also note that the variance procedure provides for less flexibility than we believe Congress contemplated, since it permits deviations from otherwise rigid and unitary limitations only where the circumstances of the particular plant are "fundamentally different" than those from which the effluent limitation was derived.

Having concluded that the regulations failed to constitute valid "guidelines" (despite their title), since they failed to provide meaningful ranges or guidance in considering individual factors, the question then arises as to the scope of our remand. Should we merely remand for promulgation of guidelines, leaving the single number limitations intact, or should we also remand for reconsideration of the limitations? We conclude that the latter approach is preferable. The guidelines can serve a meaningful purpose under our analysis only if they are coupled with limitations which represent the "ceiling" or maximum degree of effluent discharge permissible. In promulgating these regulations, the Administrator appears to have considered it his duty to establish uniform nationwide limitations, rather than establishing

a ceiling with detailed guidelines to guide the grantors within a feasible range below the ceiling.[44] Consequently, although we do not suggest that the present limitations cannot perforce represent ceilings, it is possible that those limitations might be more stringent than they would have been if they had merely been intended to represent such levels. Thus, we believe that the Administrator, in addition to promulgating guidelines, should reconsider the limitations with the base level and ceiling concepts in mind.

IV

Petitioners raise several other contentions with respect to the process by which the Administrator determined the 1977 "BPCTCA" and 1983 "BATEA" standards in his regulations. As noted in part II of this opinion, we believe it was clearly Congress' intent, despite

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44. While it is true that the Final Development Document accompanying the regulations makes some references to "base levels," it is clear that the Document used the term in a very different sense than the one in which we believe Congress used it. As we noted earlier (see notes 42 and 42a *supra* and accompanying text), we believe that Congress in referring to "base level" meant a "ceiling" on the permissible amount of effluent discharge. Page 257 of the Development Document (Appendix at 1521a), however, states that the Agency first determined the "base or minimum level of treatment . . . already in existence for practically all plants within the industry in any given subcategory," and then "added on" to that base level to reach the levels required by the "BPCTCA" and "BATEA" standards. Thus, the "base level" referred to in the Final Development Document was in reference to the level of treatment "already in existence," rather than to the maximum degree of effluent discharge the Administrator determines is permissible under the Act. We see nothing in the Development Document indicating a consideration of the type of "base level" or "ceiling" about which we are concerned.

the ambiguous wording in section 304(b), that the Administrator consider the enumerated factors in setting standards for classes and categories of industries. Petitioners contend that the Administrator failed to give sufficient consideration to these factors or to articulate his reasoning with sufficient clarity.

At the outset, it is important for us to articulate our standard of review. As in other cases involving review of an administrative agency's rule-making actions we are governed by an "abuse of discretion" standard—in other words, we must not substitute our judgment for that of the agency, but must determine whether the Administrator's actions were "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." Administrative Procedure Act § 10(e), 5 U.S.C. § 706(2); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971); *Delaware Citizens for Clean Air, Inc. v. Administrator*, 480 F.2d 972, 975-76 (3d Cir. 1973). In order to facilitate meaningful judicial review, we should require administrative agencies to "articulate the standards and principles that govern their discretionary decisions in as much detail as possible." *Environmental Defense Fund, Inc. v. Ruckelshaus*, 142 U.S.App.D.C. 74, 439 F.2d 584, 598 (1971). See also *Greater Boston Television Corp. v. FCC*, 143 U.S.App.D.C. 383, 444 F.2d 841, 851 (1970), *cert. denied*, 403 U.S. 923, 91 S.Ct. 2229, 29 L.Ed.2d 701 (1971). However, we should not reverse an agency's decision that is not fully articulated where we can reasonably discern the basis for the agency's action. *Bowman Transportation, Inc. v. Arkansas—Best Freight System, Inc.*, 419 U.S. 281, 286, 95 S.Ct. 438, 42 L.Ed.2d 447 (1974). Furthermore, the Administrator's conduct is entitled to a "presumption of regularity." *Citizens to Preserve Overton Park, supra*, 401 U.S. at 415, 91 S.Ct. 814.

A. *"Age"*—The first factor enumerated in section 304(b) which petitioners contend the Administrator did not fully consider was that of "age." Petitioners contend that the Administrator, faced with the statutory mandate to consider age, concluded that age was not relevant. However, this inaccurately states what the Administrator did. The Administrator did in fact consider age, but concluded, after studying the plants sampled, that "the processes and treatment systems are similar regardless of the age and size are similar regardless of the age and size of the plant.[45] Furthermore, as the regulations themselves state, the division of the industry by process was also, generally speaking a division by age:

> "The Agency has subdivided the steel making segment primarily along operational lines because the waste water volumes and pollutant parameters vary with the type of operation being conducted. In addition, *the processes reflect the age of the technology employed.* Subcategorization of coke making by the older beehive and the newer by-product operations and steel making by the older open hearth and the newer basic oxygen and electric arc furnace operations is indirectly subcategorization by age.
>
> "The treatment technology to be applied is primarily a function of the pollutants present and hence is a function of the type of operations conducted. *The type of pollutants present is not a function of the size or age of the operating facilities.* Land

45. Final Development Document at 107, Appendix at 1401a.

availability for application of the treatment technology is not a function of size or age since many new as well as old mills are limited on the area available for installation of treatment facilities and vice versa . . . Many of the older mills have better treatment than some of the newer ones and vice versa." 39 Fed.Reg. at 24116, comment # 16 (emphasis added).

We believe that this quotation shows that the Administrator did consider age and did sufficiently articulate his reasoning, to the extent that he concluded that age was not by itself relevant to the type of treatment technology or processes to be installed, and that separate and explicit categorization by age was not warranted. We further believe, after examining the data in the Final Development Document, that the Administrator's conclusions in this respect are fully supportable. Where we believe the Administrator erred, however, was in his failure to consider age as it had a bearing on the cost or feasibility of retrofitting plants. While all the plants in a certain older subcategory (e.g., beehive coke) may require the same technological processes to reduce effluent discharges, the fact that all the plants within that subcategory were built long before plants in another subcategory may present special problems in installing anti-pollution devices. Similarly, in a subcategory where there is considerable variation in age, the fact that the processes are similar may mean that the processes are similar may mean that the same type of control technology can be installed, but it does not necessarily mean that the ease with which that technology can be installed, or the ability to comply with effluent limitations once it has been installed, is not affected by age. Since we see no evidence that the Administrator considered age in this light, remand is appropriate. If he concludes on remand that age is not revelant to the cost or feasibility of retrofitting plans, as well as to the processes and treatment system, that conclusion will be valid to the extent it is supported by the record.

B. *"Engineering Aspects."*—Petitioners raise several points here in contending that the Administrator did not sufficiently consider this factor. They contend, *inter alia,* that for several subcategories the Administrator has suggested technology which is not currently available; that virtually all of the limitations are based on reduced flow rates which have not been demonstrated; and that many of the limitations are based on transfer technologies but lack guidelines on the engineering requirements for such transfers. Instead of considering these points as they affect the regulations in their entirety, we will defer any consideration of them until part VII of this opinion, in which we consider the specific challenges to individual limitations.

The only contention we shall consider here is that in each of two subcategories—vacuum degassing and continuous casting—the Administrator surveyed only two plants which were not representative of the subcategories as a whole. In particular, they contend that the plants surveyed were built on "green field sites," which enabled them to construct large lagoons for the treatment of waste materials, and that the treatment systems were built simultaneously with the production facilities, thereby making it easier for them to meet effluent limitations than plants which must be retrofitted. The Administrator's response to petitioner's challenge is that given the extraordinary complexity of pro-

mulgating uniform guidelines and limitations, he cannot be expected to consider all the engineering factors in specific situations. He further contends that, to the extent that a particular plant's inability to comply with an effluent limitation is attributable to the fact that it is operating under conditions "fundamentally different" than the surveyed plants, it could obtain a variance. Petitioners in support of their challenge have failed to document their assertions that reliance on studies of plants with "unrepresentative" engineering characteristics has resulted in unrealistic limitations. They refer to no record deficiency that would overcome a presumption of regularity in the Administrator's conduct. Accordingly we are convinced that the regulations cannot be declared arbitrary or capricious on this ground.

C. *"Non-water quality environmental impact (including energy requirements)."*—Petitioners contend that there is no evidence in the record to indicate that the Administrator considered these factors. We disagree, however, and believe that the Final Development Document accompanying the regulations (especially section VIII of the Document, found in Appendix at 1522a-1581a) clearly shows that he did consider them in some detail. For each category, and for each level of technology (1977 "BPCTCA" and 1983 "BATEA" standards), the Administrator considered both the problems of air pollution and solid waste disposal, as well as the problem of additional energy requirements caused by installation of the necessary anti-pollution devices. In the by-product coke subcategory, for example, the Document identified the types of air pollution emissions likely to occur and concluded that "[i]f a vapor recirculation or solvent extraction facility for dephenolization is

added to the system, significant reductions in both parameters are achieved." (Appendix at 1534a). Similarly, the Document identified the solid wastes likely to be generated by treatment systems, and concluded that they could either be internally consumed through reuse in the mill, incinerated, or used as landfill (*Id.*). With respect to additional energy requirements, the Document estimated the additional annual operating costs in terms of power for each of the two treatment alternatives—$2,175.00 for alternative I, and $31,500.00 for alternative II (Appendix at 1523a). The Administrator then evaluated the overall impact of the limitations on air quality, solid waste problems and energy requirements for all subcategories (Appendix at 1583a-1584a, 1629a and 1630a), and concluded that "[t]he enhancement of water quality management provided by these proposed effluent limitations substantially outweighs the impact on air, solid waste, and energy requirements" (Appendix at 1584a). Given the failure of petitioners to present contrary evidence as to the effects of the limitations in these areas,[46] we cannot say that the Admin-

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46. For example, after noting that the Administrator determined that the additional energy requirements for alternative I treatment technology for by-product coke in 1977 would be 0.22 kwh/kkg, petitioners claim: "Nowhere is it shown how this number was established, whether it is good, bad or indifferent." Petitioners, however, have pointed to no evidence indicating that the Administrator's figure is unrealistic. Furthermore, as noted previously, the Administrator estimated the cost of the additional energy requirement to be $2,175.00. From this, and from the Administrator's later statement that the environmental benefits outweighted any impact of energy requirements, we believe we can infer, within the meaning of *Bowman Transportation, supra,* that the Administrator found the figure to represent a tolerable level.

istrator's consideration of these factors was insufficient or that his conclusions were arbitrary and capricious.

A special problem is presented by CF&I Steel Corporation. As noted at the outset of this opinion, CF&I objects to the effluent limitations on the ground that they did not take into account the problem of water loss caused by recycle systems,[47] a problem which it claims is serious in the arid and semi-arid western states. It appears, however, that CF&I never raised this contention at the agency level, when these regulations were being formulated with extensive participation on the part of the rest of the petitioners. Normally, this would preclude our consideration of this contention for the first time at this stage. See *Unemployment Compensation Commission of the Territory of Alaska v. Aragon,* 329 U.S. 143, 155, 67 S.Ct. 245, 91 L.Ed. 136 (1946); *Portland Cement Association v. Ruckelshaus,* 158 U.S. App.D.C. 308, 486 F.2d 375, 394 (1973). Petitioners claim that the rule barring *de novo* consideration of challenges to agency action in a reviewing court should not apply here since the agency proceedings were rule-making rather than adjudicatory and since the Administrator failed to follow his mandatory and affirmative responsibility to consider certain statutory factors. Whatever merit there may be to this contention in the abstract, we do not believe that this is an appropriate case to deviate from the general rule. Labelling these proceedings "rule-making" cannot obscure the fact that

47. CF&I estimates that at present its plant causes the loss of 4.65 million gallons of water per day and that, upon installation of the necessary anti-pollution devices, this amount would increase by an additional 7 million gallons per day. The Administrator, however, disputes these estimates.

CF&I's challenge is to actions of the Administrator which affect it alone. Only three other steel mills in the entire country are located in arid or semi-arid regions,[48] and CF&I is the only company which has elleged that installation of anti-pollution devices would have an adverse effect on the water supply. Thus, this contention is one of particular and localized concern, and was not a problem which we believe was so obvious to the Administrator that it was arbitrary and capricious for him to have failed to consider it *sua sponte* during the rule-making stage.[49] We believe it would be highly disruptive to the administrative process to allow a company to sit back and wait until the regulations were published in final form before coming forth and contending that

48. Besides CF&I plant in Colorado, those plants are a United States Steel plant in California. Appendix at 1343a-1344a.

49. CF&I contends that the Administrator should have been aware of the water shortage problem because of the Federal Government's funding and sponsorship of water resource projects throughout semi-arid regions of the country, such as the Fryingpan-Arkansas Project, and because the EPA was specifically advised of Colorado's water shortage problem with respect to effluent guidelines for the beet-sugar industry. However, the fact that the Administrator perhaps should have been aware of the water scarcity problems in Colorado does not mean that it should have known that recycling systems required to meet effluent limitations for the steel industry would have had a potentially serious effect on the water supply.

We also reject CF&I's contention that the regulations are invalid because they conflict with state law requiring water conservation. To the extent that these federal regulations are valid and are in conflict with state law, they take precedence under the Supremacy Clause of the Constitution. *Cf. Florida Avocado Growers v. Paul,* 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248 (1963).

the agency had failed to consider the peculiarly local impact of its regulations in a certain region. However, while we do not believe that we can invalidate the regulations on the ground that the Administrator failed to consider this problem, we have already indicated that the matter should be remanded to the Administrator for the promulgation of guidelines and for the reconsideration of the limitations in light of the "base level" and "ceiling" concepts. We do not mean to preclude CF&I from raising its particular concerns about water scarcity in the context of the proceedings on remand. *Cf. Portland Cement Association, supra* at 394-95.

D. *"Costs."*—The final factor which petitioners contend the Administrator did not sufficiently consider was that of "costs." We have already concluded that the Administrator did not sufficiently consider the problem of age as it pertained to the cost and feasibility of retrofitting existing plants, and our present discussion of the cost factor will not repeat what was said previously. Our first task here is to clarify what Congress intended when it directed the Administrator to take costs into account. It is immediately apparent that Congress contemplated that the Administrator should give greater consideration to the cost of compliance when defining 1977 "BPCTCA" technology levels than he should when defining the 1983 "BATEA" levels. Section 304(b)(1)(B), states that the factors relating to an assessment of "BPCTA" "shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application." This is in contrast to section 304(b)(2)(B), which merely requires that the assessment of the factors "shall take into account . . . the cost of achieving such effluent reduction."

Nevertheless, while costs were intended to be given greater weight in defining "BPCTCA", it is clear that even with that 1977 standard, the cost of compliance was not a factor to be given primary importance. Furthermore, Congress clearly intended that the Administrator consider costs on a class or category basis, rather than as a plant-by-plant basis. As Senator Muskie stated in support of the House-Senate Conference Committee Report:

> "The modification of subsection 304(b)(1) is intended to clarify what is meant by the term 'practicable.' The balancing test between total cost and effluent reduction benefits is intended to limit the application of technology *only* where the additional degree of effluent reduction is *wholly out of proportion* to the costs of achieving such marginal level of reduction *for any class or category of sources.*
> "The Conferees agreed upon *this limited cost-benefit analysis* in order to maintain uniformity within a class and category of point sources subject to effluent limitations and to avoid imposing on the Administrator any requirement to consider the location of sources within a category or to ascertain water quality impact of effluent controls, *or to determine the economic impact of controls on any individual plant in a single community.*"[50]

With respect to the 1983 "BATEA" standards, Senator Muskie intended that the type of assessment should be basically the same, except that there should be no cost-benefit analysis. Although there is some ambiguity as to precisely how much weight should be given to cost,

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50. Leg.Hist. at 170 (emphasis added).

it seems that the Administrator would be governed by a standard of "reasonableness":

> "In making the determination of 'best available' for a category or class, the Administrator is intended to apply the same principles involved in making the determination of 'best practicable' (outlined above), *except as to cost-benefit analysis* . . .
>
> *"While cost should be a factor* in the Administrator's judgment, *no balancing test will be required.* The Administrator will be bound by *a test of reasonableness.* In this case, the reasonableness of what is 'economically achievable' should reflect an evaluation of what needs to be done to move toward the elimination of the discharge of pollutants and what is achievable through the application of available technology—*without regard to cost.*"[51]

With respect to the overall impact of the legislation, Congress clearly contemplated that cleaning up the nation's waters might necessitate the closing of some marginal plants. As Senator Bentsen stated:

> "There is no doubt that we will suffer some disruption in our economy because of our efforts; many marginal plants may be forced to close."[52]

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51. *Id.* (emphasis added). The ambiguity here is created by the evident inconsistency between the statements that "cost should be a factor" and that reasonableness should be determined "without regard to cost." Nevertheless, it is clear that for "BATEA" standards, cost was to be less important than for the "BPCTCA" standards, and that for even the "BPCTCA" standards cost was not to be given primary importance.

52. *Id.* at 1282.

In sum, while it is clear that the Administrator must consider cost, some amount of economic disruption was contemplated as a necessary price to pay in the effort to clean up the nation's waters, and the Administrator was given considerable discretion in weighing costs.

With these expressions of legislative intent in mind, we turn to consider the specific points raised by petitioners. Their contentions are essentially two-fold: (1) that the Administrator's consideration of costs was insufficient and incomplete, in part because he excluded certain cost factors and because his promulgation of regulations for only "primary" (or "phase I") operations[53] precluded him from evaluating the full impact of pollution control devices; and (2) that the Administrator acted arbitrarily and capriciously in promulgating regulations in the face of evidence that many plants cannot raise the necessary capital to finance the installation of anti-pollution devices and would be forced to close.

With respect to the first contention, we believe it is clear that the Administrator did consider the cost impact of the regulations. The EPA contractor developed operating and capital cost estimates for each level of technology within each subcategory, and cost-benefit diagrams were prepared for each subcategory.[54] The

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53. See note 3 *supra* and accompanying text.

54. Petitioners challenge the cost-benefit studies as being inadequate and conclusory. As we noted before, however, a cost-benefit analysis is not required at all for any technology level other than the 1977 "BPCTCA" standards, and even there it is supposed to be only a "limited" analysis. See text accompanying footnote 50 *supra.* Also, Congress well recognized the impossibility of obtaining a mathematically accurate cost-benefit anal-

estimated costs were based on an "average size plant," as determined from the surveyed plants, and were then multiplied by the total number of facilities within each subcategory to obtain a figure representing the industry-wide costs per subcategory. The EPA also estimated the total cost (including amortization) of complying with both the "BPCTCA" and "BATEA" standards to be $82.3 million, a figure which represented 0.37% of the 1972 gross revenue of the steel industry. It further estimated that the total annual costs for both air and water pollution controls after 1983 would be $1.24 billion, or 5.54% of the industry's gross revenue in 1972. On the basis of these figures, and after referring to the section of the Final Development Document discussing the deleterious effects of the pollutants sought to be controlled, the Administrator concluded:

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ysis in the area of pollution control. The portion of the Senate Report discussing § 302 of the Act, which requires a more specific cost benefit analysis for "water quality standards" than does § 304, states:

> "The Committee recognizes that no mathematical balance can be achieved in considering relative costs and benefits nor would any precise formula be desirable, but in each case the Administrator or the State will be able to determine whether there is any reasonable connection at all between the costs which a particular effluent limitation would impose and any benefits (including the attainment of natural water quality) which might be derived."

Leg.Hist. at 1466. This difficulty in quantifying such a balance has also been discussed in Note, The Federal Water Pollution Control Act Amendments of 1972: Ambiguity as a Control Device, 10 Harv.J.Legis. 565, 587-88 (1973). Cf. *Portland Cement Association v. Ruckelshaus,* 158 U.S.App.D.C. 308, 486 F.2d 375, 387 (1973). The necessarily subjective nature of such an analysis supports the view that the Administrator must have broad discretion in weighing the costs and benefits.

> "The Agency believes that the benefits of thus reducing the pollutants discharged justify the associated costs, which though substantial in absolute terms, represent a relatively small percentage of the total capital investment in the industry."[55]

Given our standard of review of agency action and the relative weights we believe Congress intended the Administrator to assign as between the need for pollution abatement and costs, we conclude that this assessment, when coupled with the economic impact analysis to be discussed below, was neither arbitrary nor capricious.

A troublesome question is presented by petitioners' contention that the costs estimated by the Administrator were artificially low because certain factors were excluded. Petitioners point to the fact that the Final Development Document listed several factors which admittedly affected costs, but which were excluded from the cost analysis. Petitioners contend that these factors, which include such things as land acquisition and site clearance costs, generate costs which are as large as those which the Administrator included in his estimates. However, petitioners have pointed to no data which would support their allegation as to the magnitude of these excluded costs factors.[56] Furthermore, many of these factors were excluded because they were inherently site-specific or because they could not be evaluated. For these reasons, we do not believe we can conclude that the exclusion of these factors from the costs analysis was arbitrary or capricious.

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55. 39 Fed.Reg. 24118.

56. Their brief merely cites the conclusory and undocumented statement which they had made in a report to the agency during the rule-making proceedings. Appendix at 1098a.

Petitioners' chief objection here is that since regulations for only primary (or phase I) operations were promulgated, no cost consideration was given to the impact of the yet-to-be-promulgated regulations for secondary operations. The "Kearney Report" estimated that those costs would be very substantial, and that the total water pollution control costs would be three to five times as high as those for primary operations (Appendix at 214a, 314a). However, we believe that the Administrator acted within the permissible scope of his discretion in dividing the steel industry into two phases. Nothing in the Act precludes him from doing so,[57] and he was operating under rigid time constraints, a court

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57. Petitioners argue that the Administrator's consideration of the costs for only phase I operations was contrary to the mandate in § 304(b)(1)(B) that he consider "total cost." We note initially that there is no such requirement in § 304(b)(2)(B), pertaining to 1983 "BATEA" standards. More important, we note that Congress intended by the phrase "total cost" only to require consideration of both "internal" and "external" costs; there is no indication that Congress intended by this phrase to preclude separate cost studies for separate regulations governing two or more broad types of operations within a particular industry. As Representative Jones stated:

> "The term 'total cost of application of technology' as used in section 304(b)(1)(B) is meant to include those internal, or plant costs sustained by the owner or operator and those external costs such as potential unemployment, dislocation, and rural area economic development sustained by the community, area, or region."

Leg.Hist. at 231. As discussed later in this opinion, we believe that the Administrator gave sufficient consideration to these factors.

injunction[58] and severe manpower problems. Given our conclusion that the Administrator had the power to promulgate regulations for the two phases separately,[59] we do not believe that the fact that costs were not considered for secondary or phase II operations necessarily requires invalidation of the phase I regulations, for which costs were thoroughly considered. Given Congress' desire that progress toward pollution abatement be expeditious, we do not think it would be advisable to require that these regulations be stayed until the Administrator has assessed the costs of phase II regulations and we are limiting the scope of our remand to what we believe are the most essential points.

Nevertheless, we are concerned that the Administrator be required at some point to assess the overall impact of his regulations in both phases. Otherwise, it is possible that the Administrator might consider the costs reasonable for each phase separately, without ever

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58. *National Resources Defense Council, Inc. v. Train*, 6 ERC 1033 (D.D.C. 1973), rev'd in part, 166 U.S. App.D.C. 312, 510 F.2d 692 (1974).

59. We also do not see much merit to petitioners' contention that the failure to promulgate phase II regulations deprives them of the ability to plan rationally in determining which plants cannot be operated economically and should be closed rather than retrofitted with pollution abatement equipment. Petitioners have presented no evidence to show that the design of treatment works for one phase would be dependent on the other. Furthermore, petitioners have been participating actively in the rule-making proceedings now under way for phase II regulations, and thus have a general idea as to what will be required of them. While petitioners do not yet know the precise numerical figures to be established in the limitations and guidelines, we believe they have sufficient knowledge to be able to make informed business decisions.

considering whether the aggregate costs on a particular industry warrant such strict standards. We thus believe that the competing interests can best be served by requiring the Administrator, when he promulgates the phase II regulations, to evaluate the total costs involved for those regulations as well as for phase I regulations.

Turning to petitioners' other main contention, we are satisfied that the Administrator considered the problem of the industry's capability of meeting these costs, and we cannot say that his conclusion was arbitrary or capricious. Petitioners rely heavily on the "Kearney Report," which was commissioned and adopted by the EPA.[60] It is true, as petitioners contend, that this Report predicts that enforcement of the regulations may force some plants to close. However, the Report believed that only 9 of the 63 integrated steel plants in the country were "prime candidates for closure or curtailment of a significant portion of their operations," and these were all identified as "marginal" plants. As the Report concluded:

> "Generally, it cannot be stated that the problems and costs of pollution control are the only, or even the principal reasons for the potential curtailments of closures of these plants. They have had a history of problems and were considered marginal operations before the impact of pollution control was felt. Rather it can be stated that pollution control is the final blow, like the 'straw that broke the camel's back.' It is entirely probable that some of those plants would ultimately have been partially or entirely close, even without pollution control requirements . . ." Appendix at 305a.

60. 39 Fed.Reg. 24116 (comment # 23); Appendix at 1692a.

The Report further stated that, on the basis of past experience, it was probable that a significant number of laid off workers (roughly 50%) would be rehired at other plants within the industry. (Appendix at 307a).

Petitioners also rely on another report (the "Booz, Allen Report") as well as on the Kearney Report as support of their contention that they could not raise the necessary capital to finance the expenditure. However, both reports relied in part on the fact that the steel industry at the time was under price controls (Appendix at 258a, 284a, 349a). Subsequent to the publication of those reports, controls were lifted, resulting in a substantial increase in steel prices. Furthermore, the economic position of the steel industry improved dramatically in 1974, to the extent that several companies announced large-scale expansion and modernization plans.[61] The Booz, Allen Report indicated that financing of pollution control devices would be impossible only in the absence of price increases. It further indicated that if an increase in $10 per ton were achieved, the industry could not both expand capacity as desired *and* install pollution abatement equipment, but would have to make a choice (Appendix at 349a). Given Congress'

61. While these developments occurred subsequent to the promulgation of the regulations in question, we believe that we should not close our eyes to such evidence where it has an important bearing on agency assumptions and predictions. See *Amoco Oil Co. v. Environmental Protection Agency,* 163 U.S.App.D.C. 162, 501 F.2d 722, 729 n.10 (1974). While this evidence was not in the nature of sworn testimony, as in *Amoco Oil,* it consisted of the companies' own announcements as to their earnings and plans, and thus can be treated as equally reliable. Furthermore, the petitioners do not contest the accuracy of this evidence.

clearly expressed concern that pollution control devices be installed even at the expense of some economic dislocation, we cannot conclude that the Administrator's regulations, to the extent that they would require postponement of capacity expansion in order to install pollution abatement devices, are arbitrary and capricious.[62] It is not the role of the courts to determine whether capacity expansion is preferable to installation of pollution control equipment. Rather, it is a choice for the Administrator to make, governed only by a standard of reasonableness.

Youngstown makes a special appeal based on the allegedly disproportionate impact that enforcement of the regulations would have on its plant and on the surrounding community in the Mahoning Valley. However, as the quotation in text accompanying footnote 50 indicates, the Administrator is not *required* "to consider the location of sources within a category." Furthermore, the "Ernst and Ernst Report," which was primarily concerned with the impact in the Mahoning Valley of more stringent water quality standards,[63] concluded that of the several options available to the steel industry in that region, it was most likely that all operations would be maintained. It also noted the possibility that some older and less efficient open hearth furnaces would

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62. The Kearney Report also concluded that pollution control equipment could be financed through the use of tax-exempt bonds. Appendix at 290a-293a. See 26 U.S.C. § 103(c)(4)(E) & (F).

63. The validity of the water quality standards is not before us in this case. Such standards are more stringent than effluent limitations, since they are intended to maintain water quality where effluent limitations are insufficient. See § 302 of the Act, 33 U.S.C. § 1312.

be replaced by cleaner and more efficient basic oxygen furnaces, and it gave only a 25% chance to the possibility that all of the plants using the open hearth process would be shut down (Appendix at 1026a-1027a). Finally, we note that the Administrator has indicated that he has not been furnished with sufficient information from the companies themselves to enable him to consider giving special consideration to the Mahoning Valley, and that "companies contending that the effluent limitation guidelines will cause curtailment of operations and heavy unemployment in the Mahoning Valley area will have the opportunity to present detailed technical, cost and financial information to support this contention." 39 Fed.Reg. 24118. We take the Administrator at his word and expect him to give serious consideration to the Mahoning Valley companies' request for special consideration upon a furnishing of the necessary data.

V

In this portion of the opinion, we shall discuss several other contentions raised by petitioners which pertain to alleged deficiencies in the process of establishing the effluent limitations. Petitioners first contend that the limitations should have been established on a net rather than a gross basis. Otherwise, they argue, they would be forced to clean up water that had already been polluted by other companies. They further contend that the varying amounts of pollutants in the intake waters often make it impossible to meet effluent limitations which have been established on a gross basis.

We believe that these objections have merit. While we do not think it practical or necessary at this stage to require the recalculation of the limitations to place them all in a net basis, we believe that any individual point source should be entitled to an adjustment in an

effluent limitation applicable to it if it can show that its inability to meet the limitation is attributable to significant amounts of pollutants in the intake water. Such an adjustment would seem required by due process, since without it a plant could be subjected to heavy penalties because of circumstances beyond its control. Furthermore, such a plant may risk incurring penalties even though it had installed precisely the same pollution abatement equipment as another plant which, because its intake waters were cleaner, could meet the limitation and thus avoid any fines.

The Administrator has recognized this problem and has proposed regulations specifying those situations in which the Regional Director "may" allow a credit for pollutants already present in the intake waters.[64] While these regulations have not yet been promulgated, the Administrator contended at oral argument that the Regional Directors are in fact making allowances at this time for such pollutants. However, the absence of any final written regulations and of any record evidence as to the basis on which such allowances are made prevents us from conducting any meaningful judicial review. Considering the importance we give to this problem, we cannot rely on mere oral assurances by the Administrator that allowances are already being made. Furthermore, the Administrator's response to petitioners' comment requesting net limitations appears to indicate that the Regional Administrator would be given some discretion in deciding whether to make an allowance.[65]

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64. 39 Fed.Reg. 24115, comment # 11.

65. The Administrator's response was that "the agency is currently developing amendments to its NPDES permit regulations (40 CFR Part 125) which will specify the situations in which the Regional Administrator *may* allow a credit for the pollutants present in the plant's intake waters." 39 Fed.Reg. 24115, comment # 11 (emphasis added).

We believe that the scope of this discretion should be carefully defined and that the Administrator (as well as any state permit-issuing authorities) should be clearly instructed as to those circumstances under which a credit *must* be given. Consequently, we conclude that on remand the regulations should be revised to establish precise guidelines for the making of such allowances.

Petitioners' remaining contentions are without merit. They first contend that the regulations are arbitrary and capricious because the "variance" procedure has not yet been established. It is clear, however, that the Administrator did introduce into the regulations for each subcategory a provision which would allow the permit issuers to modify the effluent limitation applicable to a particular point source upon a showing that the factors relating to that source's ability to comply with the limitations are "fundamentally different from the factors considered in the establishment of the guidelines." Petitioners nevertheless claim that because the Administrator subsequently requested public comment on how the variance provision should be applied and interpreted,[66] the procedure was still not established. While it is true that the variance procedure has not been definitively delineated, we believe it was clearly established and that is an operative part of the regulations. Furthermore, we note that, because of our remand for the promulgation of guidelines and the reconsideration of the limitations in light of the base level concept, the flexibility provided by the variance procedure may not necessarily be brought into play.

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66. 39 Fed.Reg. 28926 (Aug. 12, 1974).

Petitioners also argue that the Administrator erred in failing to establish the monthly average of effluent loads permissible on a long-term (preferably, a yearly) basis. While conceding that the regulations permit a daily variation of up to three times the monthly average, petitioners contend that the failure to premise a monthly average on a long-term basis does not sufficiently recognize the possibility of monthly variations in effluent discharges that are bound to occur even with the best technology. However, we do not see how the failure to establish a monthly average in this fashion constitutes an abuse of discretion, especially considering the statutory time constraints on the Administrator which would have precluded a year-long sampling effort.

Finally, we reject petitioners' contention that the regulations are invalid because the Administrator failed to use an adequate data base from which to promulgate them. Given the Administrator's clear mandate to press the development of technology,[67] we do not believe it was necessarily an abuse of discretion to base the regulations on results obtained from a few plants which

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67. The Senate Report stated:
"The Administrator will have the capability and the mandate to press technology and economics to achieve those levels of effluent reduction which he believes to be practicable in the first instance and attainable in the second. . . .

". . . It is acknowledged that in those industrial categories where present practices are uniformly inadequate, the Administrator may determine best practicable to require higher levels of control than any currently in place if he determines the technology to achieve those higher levels can be practicably applied."

Leg.Hist. at 1460, 1468.

were using the best technology. Rather than invalidate the regulations across the board, we believe it is more appropriate to focus on whether there is record evidence showing that any particular limitation resulting from this data base is lacking in feasibility. We shall consider that question in part VII of this opinion.

VI

Thus far, we have been addressing petitioners' various contentions pertaining to the Administrator's promulgation of regulations for existing point sources under sections 301 and 304 of the Act. In this section we shall consider petitioners' challenge to the Administrator's interpretation of his power to promulgate effluent limitations for new point sources under section 306. As noted previously,[68] the existence of the Administrator's power to promulgate such limitations—unlike that of his power to promulgate effluent limitations for existing sources under section 301—is clear and unquestioned. The principal issues here are whether the Administrator erred in adopting standards for new sources which were identical to the existing source standards to be applicable in 1983 and whether he erred in relying on his consideration of the factors enumerated in section 304 to satisfy the requirements of section 306.

The Act refers to three distinct levels of technology which must be attained. For existing sources, the standard to be applicable in 1977 is the "best practicable control technology currently available," or "BPCTCA." The 1983 standard for existing sources is the "best available technology economically achievable," or "BATEA." The standard applicable to new sources is the "best available

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68. *See* note 4 *supra*.

demonstrated control technology," or "BADCT." It is unquestioned that the 1977 "BPCTCA" is the least stringent of the three. The dispute focuses on the relative degree of stringency between the 1983 "BATEA" standards and the new source "BADCT" standards. The Administrator took the view that these two standards were essentially similar. In his establishment of "BADCT" standards, he merely incorporated by reference the relevant "BATEA" standards. The only independent analysis he conducted in defining "BADCT" levels was to determine as required by section 306, whether a "zero discharge" level was "practicable." Since he determined in each case that a "zero discharge" level for new sources was not practicable, he merely adopted the "BATEA" standards. Petitioners, however, contend that the new source standards should be less stringent than the 1983 "BATEA" standards, since the Act requires that the new source standards be "demonstrated" and that they be achievable now rather than by 1983.

We reject petitioners' contention that it was necessarily error for the Administrator to equate the two standards. While it is true that the new source standards, unlike the 1983 standards for existing sources, must be based on technology whose present availability is "demonstrated," it is clear that Congress did not intend by that phrase to limit the technology to that which is widely in use. As the House Report stated:

> "It will be sufficient, for the purpose of setting the level of control under available technology, that there be one operating facility which demonstrates that the level can be achieved or that there is sufficient information and data from a relevant pilot plant or semi-work plant to provide the needed

> economic and technical justification for such new source."[69]

Furthermore, Congress was clearly appreciative of the fact that the most effective and least expensive approach to water pollution would be to prevent new water pollution problems by requiring "maximum feasible control of new sources, at the time of their construction."[70] Thus, Congress recognized that new sources could attain discharge levels more easily and at less cost than existing sources which must be retrofitted. As the House Report stated:

> "In section 306, the Committee recognizes two of the most significant factors in the attainment of clean water. These factors are (1) the need to preclude the construction of new sources or the modification of existing sources which use less than the best available control technology for the reduction or elimination of the discharge of pollutants, and (2) the recognition of the significantly lower expense of attaining a given level of effluent control in a new facility as compared to the future cost of retrofitting a facility to meet stringent water pollution control measures."[71]

This awareness of the lower costs that would be incurred by new sources led Congress to require that less weight be given to costs under section 306 than under section 304. As Senator Muskie stated with reference to the Administrator's requirement to consider costs under section 306:

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69. Leg.Hist. at 798.
70. *Id.* at 1476 (Senate Committee Report).
71. Leg.Hist. at 797.

"The Conferees would expect that this cost test would be considerably more restrictive than the test which would be applied to 'best available technology' because pollution control alternatives are available to a new source which are not available to existing sources."[72]

In sum, given Congress' clearly expressed belief that it would be easier for new sources to attain a particular level of effluent control than it would be for existing sources, and given the fact that the Administrator was permitted to rely on pilot projects (or "transfer technology")[72a] to determine whether a particular standard was "demonstrated," we do not believe that it was arbitrary or an abuse of discretion for the Administrator to equate the "BADCT" levels for new sources with the "BATEA" levels for existing sources. The fact that Congress anticipated that new sources could achieve particular effluent limitations more easily than existing sources points in the direction of *greater* stringency for new source standards and counter-balances somewhat the requirement that technology for new sources be "demonstrated"—a requirement which, as we have seen, can be met through reliance on pilot projects. We thus conclude that it was not necessary for the Administrator to conduct a separate study of technology for new sources and that he acted within the permissible scope of his discretion in relying on the portions of the Final Development Document which discuss the "BATEA" standards.[73] Rather than invalidate the section 306 limitations totally, we believe it is more appropriate to examine each one being challenged to determine whether the record supports the Administrator's conclusion that the standard has been "demonstrated."

72. *Id.* at 172.

72a. "Transfer technology" refers to technology which has been developed in one process or industry but which the Administrator believes can be successfully "transferred" to other processes or industries which operate under similar conditions.

Petitioners also contend that the Administrator failed to consider factors which section 306 required him to consider in establishing new source standards. These factors are basically the same as those which must be considered under section 304, with one obvious and notable exception—the factor of age. Since we concluded in part IV of this opinion that age was the only factor that the Administrator did not sufficiently consider,[74] and since we have held that the consideration that went into the existing source standards could properly be relied on as a basis for the new source standards, part IV of this opinion controls petitioners' contentions here. We believe it is appropriate to make only one further comment. Petitioners contend that the

73. We thus reject as frivolous petitioners' contention that "the entire study of the new source standards of performance comprises only five pages of the final development document prepared to support the Regulations," since the study underlying the "BATEA" levels served also as the basis for the "BADCT" levels.

74. In part IV(c) of this opinion, we concluded that, while CF&I could not raise in this petition the Administrator's failure to consider the evaporation problem, it could do so on remand in the context of the proceedings spelled out in part III of this opinion. Since we see no error in the establishment of the § 306 limitations which would require remand to reconsider those limitations in their totality, CF&I will be unable to raise the evaporation problem with respect to any new sources it may be planning to construct.

Administrator failed "to make the requisite cost/benefit analysis." However, no cost/benefit analysis is required under section 306. Rather, the Administrator is required only to take costs "into consideration." This language is virtually identical to that appearing in section 304(b)(2)(B), which requires the Administrator to take costs "into account" in assessing "BATEA" levels and which is distinct from the limited cost/benefit analysis required in section 304(b)(1)(B). Furthermore, as can be seen from the quotation of Senator Muskie in the text accompanying footnote 72 of this opinion, cost was to be given even less weight under section 306 than for existing sources.

VII

In this section of the opinion we consider petitioners' arguments that the specific limitations for both new and existing point sources are too stringent. It is first necessary to explain how our consideration of these contentions is affected by our earlier discussion. With respect to the new source standards promulgated under section 306, we found no error in the process by which those standards were formulated. The only error we found regarding the existing source limitations which would also affect the new source standards was the failure to give a credit where noncompliance was attributable to pollutants in the intake waters. While remand of the section 306 limitations is required so that the regulations can be redrafted to provide for credits as required in part V of this opinion, there is no need on remand to reconsider those limitations themselves across the board. Consequently, it is essential that we consider the technological challenges to the new source standards at this time.

With respect to the existing source standards, we have previously indicated that, in addition to the necessity to promulgate regulations pertaining to credits where the intake waters are polluted, remand is necessary to promulgate guidelines under section 304, to reconsider the limitations in light of the "base level" and "ceiling" concepts and to consider more fully the factor of age. See parts III and IV(A) of this opinion. In many cases, it might be preferable to defer considering the technological challenges to existing source limitations until the proceedings on remand are completed, since the limitations might be relaxed somewhat in light of the "base level" and "ceiling" concepts. We believe, however, that it is appropriate to consider them now. As a matter of judicial economy, and given Congress' desire to move expeditiously in attacking the problems of water pollution, we do not think it would be advisable to postpone consideration of the technological challenges until the remand proceedings are completed several months hence. Furthermore, we note that the challenges to the 1977 "BPCTCA" levels of technology are very few in number, and the challenges to the 1983 "BATEA" standards are of a general rather than specific nature. Finally, we note that under petitioners' own construction of the statute, any limitation which is sufficiently "demonstrated" to be a valid new source standard must also be a valid 1983 "BATEA" limitation. Thus, our consideration of the technological challenges to the new source standards (which we must make) will necessarily have considerable bearing on the validity of the 1983 "BATEA" standards. We emphasize, however, that our holding that whether limitations have been sufficiently demonstrated for purposes of "BATEA" and "BPCTCA" standards merely means that those limitations repre-

sent achievable points within a feasible range and that the Administrator must not automatically assume that the present limitations can represent permissible "ceilings."

A: THE 1977 "BPCTCA" LIMITATIONS

Petitioners challenge the 1977 limitations with respect to only two sub-categories: by-product coke and sintering. They make two points regarding the by-product coke limitations. First, they contend that an effluent "flow rate"[74a] of 175 gallons per ton of coke produced was unrealistic, and assert that the Administrator disregarded evidence that a 300 gallon per ton flow rate was the best practicable. However, two of the four by-product coke plants surveyed (plants A and B) were attaining a flow rate less than the 175 gallon per ton level. Furthermore, petitioners' recommendation of a 300 gallon per ton flow rate follows that of the "Koppers Report," which recommended a flow rate which had been doubled through a 1:1 dilution.[74b] Neither petitioners nor the Koppers Report explain why such a dilution is necessary, and the undiluted flow rate recommended by Koppers would be less than 175 gallons per ton. Under these circumstances, we cannot conclude that the Administrator's figure of 175 gallons per ton was "arbitrary" or "capricious."

74a. The "flow rate" refers to the amount of waste water discharged (in terms of gallons) for each ton of product (e. g., coke or steel) produced. Since the limitations are expressed in terms of pounds of pollutants per 1000 pounds of product and are derived from a multiplication of flow and concentration, tradeoffs can occur between flow and concentration provided the limitation is not exceeded.

74b. This figure means one part fresh water added to each part of waste water.

Petitioners' second point is that the 1977 limitations regarding ammonia discharge from by-product coke plants are without support. Petitioners' contend that use of a bio-oxidation facility as recommended by the Administrator will actually increase the amount of ammonia in the effluent. However, biological treatment is only one of two alternative treatment systems. Two of the other plants surveyed which used the other treatment alternative (one which provides for physical and chemical treatment) achieved the effluent limitation. So long as the limitation can be achieved through the use of one of the alternatives, it is valid. Furthermore, even in the one plant using the bio-oxidation process, ammonia was removed from the waste water at a rate of 28.8% (Appendix at 1469a), thus undercutting petitioners' claim that the process increased ammonia discharge. While that removal rate was not sufficient to meet the 1977 "BPCTCA" limitation, the Administrator noted that the plant "was not employing the ammonia removal step ahead of the biological system as proposed in the treatment schematic."[75]

Petitioners' challenge to limits in the sintering subcategory is based on the fact that the sampled plants had a wet cleaning system only on the "deduster" end, whereas the limitations were applicable to sintering plants with wet cleaning systems on both the "deduster" and the "wind-box." They therefore contend that the limitations were based on unrepresentative plants and were thus too restrictive. The Administrator responds

75. 39 Fed.Reg. 24116 (comment # 22).

by claiming that any sinter plant with wet systems on both ends can obtain a variance under 40 C.F.R. § 430.32 on the ground that such plants operate under conditions "fundamentally different" than the tested plants. This response is satisfactory to us and would appear to fully meet petitioners' objection.[76] We thus reject all of petitioners' challenges to the "BPCTCA" limitations.

B: The 1983 "BATEA" Limitations

As noted previously, petitioners' objections to the 1983 "BATEA" standards are very general. Essentially, they repeat their allegations with respect to the new source standards, which are discussed in part VII(C) of this opinion. They also contend that reliance on transfer technology was improper. However, given the Act's mandate to the Administrator to press the development of technology,[77] reliance on transfer technology was clearly proper. As Senator Muskie stated:

> "The distinction between 'best practicable' and 'best available' is intended to reflect the need to press toward increasingly higher levels of control in six-year stages. Through the research and development of new processes, modifications, replacement of obsolete plans and processes, and new improvements in technology, it is anticipated that it should be possible, taking into account the cost of controls, to achieve by 1983 levels of control which approach

76. Petitioners make the same contention, and the Administrator makes the same response, with respect to the new source standards. We believe the response is equally sufficient there.

77. *See* note 67 *supra* and accompanying text.

> and achieve the elimination of the discharge of pollutants."[78]

Furthermore, since we have concluded that reliance on pilot plant technology was proper in establishing limitations for new sources, it should also be proper in establishing 1983 "BATEA" limitations for existing sources.

Finally, petitioners contend that because the 1983 standards are not to be applicable for another eight years and because they were published under severe time pressures and were based on "guesswork," they should be remanded for more careful consideration. As petitioners acknowledge, however, the Act contemplates that the section 301 limitations be reviewed "at least every five years."[79] We believe it is premature for petitioners to insist on such review now. Rather, we believe that the Act contemplates a period of a few years after which the accuracy of the Administrator's evaluations and projections can be reviewed in the light of actual experience.

C: The New Source Standards

1. *Flow Rates.*—Petitioners first challenge the 100 gallon per ton flow rate for new by-product coke plants. As noted previously, we are satisfied that the Administrator did not act arbitrarily and capriciously in using a 175 gallon per ton flow rate for 1977 "BPCTCA" limitations in the by-product coke subcategory. However, we agree with petitioners that a 100 gallon per ton flow rate has not been "demonstrated." None of the sampled plants achieved such a flow rate, and the Administrator has not pointed to any transfer technology indicating

78. Leg.Hist. at 170.

79. Section 301(d), 33 U.S.C. § 1311(d).

that such a flow rate is achievable for by-product coke. The Administrator instead relies on the Koppers Report, claiming that the Report's recommendation supports a 100 gallon per ton rate. The Koppers Report, however, merely makes a recommendation, and even that is for a 300 gallon per ton rate. Even if the Administrator is correct in saying that a 1:1 dilution is not necessary and that certain effluents were improperly included in the Koppers Report, we do not believe that the "recommendation" there can satisfy the requirement in section 306 that the technology be "demonstrated." We see no evidence in the record that an actual plant—pilot project or otherwise—has achieved a 100 gallon per ton flow rate. Thus, the new source standards for by-product coke should be reconsidered in light of a new and "demonstrated" flow rate.[80]

Petitioners also contend that the flow rates for the sintering, blast furnace, basic oxygen furnace ("BOF") and continuous casting subcategories were not supported by the record. Petitioners contend that the flow rates have not been demonstrated, but were based on the Administrator's belief as to the viability of "recycle systems." Petitioners contend that such systems are not viable because of prebloms of plugging, scaling and corrosion. While the evidence in the record as to the severity of the plugging and scaling problem is quite sketchy, we believe that petitioners have raised a valid point and that remand is appropriate for further consideration of this problem. In the sintering subcategory, for example,

80. Similarly, we see no evidence that the technology for achieving such a flow rate is "available" within the meaning of § 301(b)(2)(A), and thus we likewise remand for further consideration of the BATEA limitations for by-product coke.

the "BATEA" and "BADCT" flow rates were set at 50 gallons a ton, but the only plant on which full data were obtained (Plant J, which already used a recycle system) had a flow rate of 114 gallons per ton. In the Final Development Document, the Administrator concluded that this figure was "excessive" and could be reduced by more than 50 per cent simply by "tightening up the recycle loop." However, he then noted: "In doing this, more attention may have to be paid to control of heat buildup and scaling and/or corrosive conditions in the recycle systems."[81] This strikes us as a virtual confession that it has not been "demonstrated" that a 50 gallon per ton flow rate can be achieved in the absence of scaling and corrosion. Furthermore, petitioners contended in a submission to the Administrator that "even with the 114 gallon/ton Plant 'J' has abandoned approximately 90% of the wet system because of excessive scaling." (Appendix at 1111a). If this fact is true, it would raise serious questions as to whether the viability of recycle systems has been demonstrated.

The Administrator, however, relied on transfer technology from the Open Hearth and BOF recycle systems, which had actually achieved flow rates of 50 gallons per ton. He concluded that "the technology should be readily transferable to a sinter plant, since the type of recycle system and many of the aqueous contaminants are identical."[82] Petitioners contend that, at least with respect to the BOF process, the surveyed plants did not show that a 50 gallon per ton flow rate could be achieved in the absence of plugging problems. While

81. Final Development Document at 336 and 387 (Appendix at 1599a and 1650a).

82. *Id.*

Plant "S" attained a flow rate of 52.2 gallons per ton,[83] petitioners contend that that plant used an "off gas" (or "OG") system which treated less gas and did not become as hot as a typical BOF system. Thus, they assert that there was less evaporation and consequently a smaller build-up of solids that would cause plugging. They further contend that there are only two OG systems in the country.[84] We see no evidence that the Administrator in his response to petitioners' comments[85] considered whether the lack of plugging and scaling in Plant "S" (which did not meet the 50 gallon per ton rate anyway) was attributable to its use of an OG system, which might make it unrepresentative of the BOF subcategory.

The Administrator also relies on the results obtained from Plant "V," another BOF plant, which allegedly attained a flow rate of 33 gallons per ton[86] through use of a typical treatment system. Petitioners contended below that the flow rate must have been merely an estimate, since no water flow measurements could be found in the EPA contractor's report. They further contended that recent flow measurements at the plant showed that the actual water use was more than twice the figure used by the contractor, and that such higher water use was necessary to prevent plugging problems.[87] The Administrator responded to this by asserting that "other information available to the agency indicates that the actual rate is less than 250.3 1/kkg (60

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83. *Id.* at 218 (Appendix at 1496a).

84. Appendix at 1114a.

85. 39 Fed.Reg. 24115 (comment # 10).

86. Final Development Document at 226, Appendix at 1501a.

87. Appendix at 1115a.

gallons per ton) and also that the plugging problems resulted not from operating the BOF scrubber portion of this multi-purpose system at the design rate, but due to problems in the other part of the systems."[88] However, the Administrator never specified what this "other information" was. In light of his failure to do so, meaningful judicial review of his conclusion is impossible.

We thus believe that there are a number of serious questions concerning the viability of recycle systems as they pertain to the sintering and BOF subcategories. With respect to the blast furnace and continuous casting subcategories, we are satisfied from the record that the "BATEA" and "BADCT" flow rates of 125 gallons per ton were demonstrated,[89] and petitioners have pointed to no record evidence of plugging or scaling in those plants. The Administrator may, of course, rely on transfer technology in establishing the flow rates for the sintering and BOF subcategories. However, in view of the questions that have been raised, we believe that remand is necessary so that the Administrator can more fully consider the plugging and scaling problem and can more fully articulate the reasoning for his conclusion that the 50 gallon per ton flow rates for the sintering and BOF subcategories have been "demonstrated."[90]

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88. Fed.Reg. 24115 (comment # 10). Furthermore, his response still does not indicate whether a *50* (rather than a 60) gallon per ton flow rate was demonstrated.

89. *Id.* (comment # 13).

90. With respect to petitioners' contention that the flow rates were established based on a sintering plant having a wet scrubber system only on the "dedusting" end, we have already indicated that plants having scrubbers on both ends would be entitled to a variance if they show that their inability to achieve the flow rate is at-

2. *The Limitations.*—Petitioners challenge the BADCT standards for by-product coke on the ground that neither of the two alternative technologies relied upon to achieve the standards have been "demonstrated." While we tend to agree with petitioners that one of the two alternatives (the "multi-stage" biological treatment systems) has not been demonstrated,[91] we are satisfied that the second alternative, which utilizes "alkaline" (or "breakpoint") chlorination and "carbon adsorption," has been sufficiently demonstrated. As long as there is one demonstrated method of attaining the limitation, the limitation is valid.

Petitioners' challenge to the alkaline chlorination process is basically two-fold: that it has never been demonstrated on by-product coke wastes, and that the chlorination process gives off chlorinated organics which are potentially more dangerous than the pollutants sought to be removed. With respect to the first point, the Administrator relied on transfer technology from other industries (particularly the electroplating

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tributable to their "fundamentally different" characteristics. *See* part VII(A) of this opinion, at text accompanying note 76 *supra.*

91. Our skepticism as to the Administrator's belief that this technology has been demonstrated is based on the rather equivocal support for that alternative given in the Final Development Document itself, which stated that such treatment was "possible" (Appendix at 1467a). Furthermore, the Administrator's reliance on transfer technology involving nitrification and denitrification processes (based on demonstrated success of nitrogen removal from municipal wastes) seem inconsistent with his recognition that a transfer of the biological denitrification process from municipal waste treatment to the open hearth and vacuum degassing subcategories was inappropirate. See 39 Fed.Reg. 24118 (comment # 7).

and water treating industries),[92] and petitioners have pointed to no evidence why such transfer would not be appropriate. Furthermore, petitioners admit that alkaline chlorination has been demonstrated on blast furnace effluent in a "once-through" system[93] but contend, without pointing to any evidence in support of their view, that such a process would not work in a recycled system.[94]

With respect to the problem created by chlorinated organics, the Administrator responds that the addition of the carbon adsorption process after chlorination was prescribed specifically to remove such chlorinated organics. Furthermore, carbon adsorption has been applied on a large-scale basis in the petroleum industry for years,[95] and petitioners have pointed to no evidence indicating that the use of such transfer technology is inappropriate. In the absence of such evidence, we cannot say that the reliance on such transfer technology was arbitrary or an abuse of discretion.

Petitioners' next challenge is to the "BATEA" and "BADCT" limitations for suspended solids in the continuous casting subcategory. However, an examination of the record shows that one plant (Plant "AE") clearly achieved the limitations. Petitioners contend that the results from that plant are not achieved on a continuous basis and thus did not reflect the varying characteristics

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92. 39 Fed.Reg. 6495.

93. Plant L, Final Development Document at 203 (Appendix at 1486a).

94. For this reason, we also reject petitioners' challenge to the "BADCT" limitations established for the blast furnace subcategory.

95. 39 Fed.Reg. 6495.

of the intake waters. We have already held, however, that the Administrator must make a provision in the regulations which entitles a point source to a credit when it shows that its inability to meet an effluent limitation is attributable to substances in the intake waters. See part V of this opinion. We believe that such a provision would meet petitioners' objection to this limitation and would protect them from the imposition of penalties because of circumstances beyond their control.

Petitioners also challenge the "BATEA" and "BADCT" suspended solid limitations for the BOF and vacuum degassing subcategories, contending that the technology for achieving those limitations has not been demonstrated. After examining the record, however, we are satisfied that the achievability of a 25 mg/1 limitation has been demonstrated for the BOF subcategory. Two plants in the BOF subcategory achieved limitations of 23 and 26 mg/1.[96] However, none of the vacuum degassing plants surveyed appears to have achieved this limitation. Rather, the Final Development Document merely states that all the critical parameters in the vacuum degassing operations were found to be the same as those for the open hearth subcategory.[97] However, none of the open hearth plants achieved the limitation either. The Final Development Document judged the performance of the surveyed open hearth plants to

96. Final Development Document at 404, Appendix at 1667a. This limitation, however, is based on a flow rate of 50 gallons per ton and thus may not be valid if, on remand, the evidence shows that the plugging and scaling problems are of such magnitude that the viability of recycle systems cannot be termed "demonstrated."

97. Final Development Document at 410, Appendix at 1673a.

be "uniformly inadequate" and stated: "As with the similarly operated BOF wet recycle systems, less than 25 mg/1 suspended solids can readily be achieved."[98] This statement may be supportable, but we hesitate to accept such a conclusory statement on this record, at least insofar as it is relied on to support the limitation for the vacuum degassing subcategory. This is a reliance on a transfer on top of a transfer, without any explanation, and the ultimate source of this transfer twice removed—the BOF subcategory—establishes a valid limitation only if the flow rate can be termed "demonstrated."[99] Thus, we believe the Administrator should be required to explain in more detail why the reliance on transfer technology is permissible in establishing the "BATEA" and "BADCT" limitations for suspended particles in the vacuum degassing category.

Finally, petitioners challenge the 20 mg/1 fluoride limitation for the BOF subcategory. The one BOF plant studied had what was equivalent to a 63 mg/1 fluoride discharge.[100] However, the Administrator adopted the same approach as he did in the sintering subcategory[101] and concluded that the limitation could be met by "lime precipitation" of fluoride, a technology deemed "readily transferable" from raw waste treating plants to wastewater treatment in the steel industry.[102] Petitioners claim that this "theoretically" transferable technology fails to give consideration to a number of factors, but

98. *Id.* at 405, Appendix at 1668a.

99. *See* note 96 *supra.*

100. Final Development Document at 404, Appendix at 1667a.

101. *Id.* at 388, Appendix at 1651a.

102. *Id.*

cites no record evidence as to their importance and offers no convincing explanation as to why the fluoride treatment technology, which has been successfully used on a full-scale basis in other industries, is not easily transferable to the BOF process.

In addition to challenging the above limitations as not being demonstrated, petitioners contend that no *justification* has been given for the 20 mg/1 fluoride limitation in the sintering, blast furnace, BOF, open hearth and electric arc subcategories, or for the 5 mg/1 zinc limitation in the open hearth, electric arc and vacuum degassing subcategories. However, it appears that these two elements were both present in the discharge of existing plants in those subcategories, and thus it was reasonable to assume that they would also be present in the discharge of new sources using the same raw materials. The Final Development Document also discusses the adverse environmental impact of fluoride and zinc.[103] However, the Administrator admits that "there is some evidence that zinc ions are adsorbed strongly and permanently in silt, resulting in inactivation of the zinc."[104] In light of this admitted evidence, we believe that the Administrator should explain more fully why a zinc limitation is necessary.

VIII

Accordingly, the matter will be remanded to the Environmental Protection Agency for further proceedings consistent with this opinion.[105]

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103. *Id.* at 159-61, Appendix at 1452a-54a.

104. *Id.* at 160, Appendix at 1453a.

105. We also deny as moot the stay sought by petitioners' pending appeal.

ADDENDUM

Relevant parts of the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, 33 U.S.C. § 1251, et seq. [Those portions which are of special importance have been italicized for emphasis.]

SECTION 101

§ 1251. Congressional declaration of goals and policy.

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop

technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under this chapter. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

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SECTION 301

§ 1311. Effluent limitations.

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives.

In order to carry out the objective of this chapter *there shall be achieved*—

(1) (A) *not later than July 1, 1977, effluent limitations for point sources,* other than publicly owned treatment works, (i) which shall require the

application of the *best practicable control technology currently available* as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d) (1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2) (A) *not later than July 1, 1983, effluent limitations for categories and classes of point sources,* other than publicly owned treatment works, which (i) shall require application of the *best available technology economically achievable* for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined

in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title.

(c) Modification of timetable.

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations.

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations.

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste.

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters. (June 30, 1948, ch. 758, Title III, § 301, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 844.)

SECTION 302

§ 1312. Water quality related effluent limitations.

(a) Whenever, in the judgment of the Administrator, discharges of pollutants from a point source or group of point sources, with the application of effluent limitations required under section 1311(b)(2) of this title, would interfere with the attainment or maintenance of that water quality in a specific portion of the navigable waters which shall assure protection of public water supplies, agricultural and industrial uses, and the protection and propagation of a balanced pollution of

shellfish, fish and wildlife, and allow recreational activities in and on the water, effluent limitations (including alternative effluent control strategies) for such point source or sources shall be established which can reasonably be expected to contribute to the attainment or maintenance of such water quality.

(b) (1) Prior to establishment of any effluent limitation pursuant to subsection (a) of this section, the Administrator shall issue notice of intent to establish such limitation and within ninety days of such notice hold a public hearing to determine the relationship of the economic and social costs of achieving any such limitation or limitations, including any economic or social dislocation in the affected community or communities, to the social and economic benefits to be obtained (including the attainment of the objective of this chapter) and to determine whether or not such effluent limitations can be implemented with available technology or other alternative control strategies.

(2) If a person affected by such limitation demonstrates at such hearing that (whether or not such technology or other alternative control strategies are available) there is no reasonable relationship between the economic and social costs and the benefits to be obtained (including attainment of the objective of this chapter), such limitation shall not become effective and the Administrator shall adjust such limitation as it applies to such person.

(c) *The establishment of effluent limitations under this section shall not operate to delay the application of any effluent limitation established under section 1311 of this title.* (June 30, 1948, ch. 758, Title III, § 302, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 846.)

SECTION 304

§ 1314. Information and guidelines.

(a) Criteria development and publication.

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(b) Effluent limitation guidelines.

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, *providing guidelines for effluent limitations* and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1) (A) *identify,* in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, *the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources* (other than publicly owned treatment works); and

(B) *specify factors to be taken into account in determining the control measures and practices to be applicable to point sources* (other than publicly owned treatment works) *within such categories or classes.* Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b) (1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process

employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2) (A) *identify,* in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the *degree of effluent reduction attainable through the application of the best control measures and practices achievable in*cluding treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) *specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source* (other than publicly owned treatment works) *within such categories or classes.* Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking

into account the cost of achieving such elimination of the discharge of pollutants.

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SECTION 306

§ 1316. National standards of performance.

(a) Definitions.

For purposes of this section:

(1) The term "standard of performance" means a standard for the control of the discharge of pollutants which reflect the greatest degree of effluent reduction which the Administrator determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

(2) The term "new source" means any source, the construction of which is commenced after the publication of proposed regulations prescribing a standard of performance under this section which will be applicable to such source, if such standard is thereafter promulgated in accordance with this section.

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(b) Categories of sources; Federal standards of performance for new sources.

(1) (A) The Administrator shall, within ninety days after October 18, 1972, publish (and from time to time thereafter shall revise) a list of categories of sources, which shall, at the minimum, include:

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iron and steel manufacturing;

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(B) As soon as practicable, but in no case more than one year, after a category of sources is included in a list under subparagraph (A) of this paragraph, the Administrator shall propose and publish regulations establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one hundred and twenty days after publication of such proposed regulations, such standards with such adjustments as he deems appropriate. The Administrator shall, from time to time, as technology and alternatives change, revise such standards following the procedure required by this subsection for promulgation of such standards. Standards of performance, or revisions thereof, shall become effective upon promulgation. In establishing or revising Federal standards of performance for new sources under this section, the Administrator shall take into consideration the cost of achieving such effluent reduction, and any non-water quality environmental impact and energy requirements.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards and shall consider the type of process employed (including whether batch or continuous).

(3) The provisions of this section shall apply to any new source owned or operated by the United States.

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SECTION 316

§ 1326. Thermal discharges.

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(b) Cooling water intake structures.

Any standard established pursuant to section 1311 of this title or section 1316 of this title and applicable to a point source shall require that the location, design, construction, and capacity of cooling water intake structures reflect the best technology available for minimizing adverse environmental impact.

(c) Period of protection from more stringent effluent limitations following discharge point source modification commenced after October 18, 1972.

Notwithstanding any other provision of this chapter, any point source of a discharge having a thermal component, the modification of which point source is commenced after October 18, 1972, and which, as modified, *meets effluent limitations established under section 1311 of this title* or, if more stringent, effluent limitations established under section 1313 of this title and which effluent limitations will assure protection and propagation of a balanced, indigenous population of shellfish, fish, and wildlife in or on the water into which the discharge is made, shall not be subject to any more stringent effluent limitation with respect to the thermal component of its discharge during a ten year period beginning on the date of completion of such modification or during the period of depreciation or amortization of such facility for the purpose of section 167 or 169 (or both) of Title 26, whichever period ends first. (June 30, 1948, ch. 758, title III, § 316, as added Oct. 18, 1972, Pub.L. 92-500, § 2, 86 Stat. 876.)

SECTION 401

§ 1341. Certification.

(a) Compliance with applicable requirements; application; procedures; license suspension.

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title. *In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b)* and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, *the State shall so certify,* except that any such certification shall not be deemed to satisfy section 1371(c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license

or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

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SECTION 402

§ 1342. National pollutant discharge elimination system.

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, *upon condition that such discharge will meet either all applicable requirements under sections 1311,* 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

* * * * * *

(b) State permit programs.

At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administration a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A) *apply, and insure compliance with, any applicable requirements of sections 1311,* 1312, 1316, 1317, and 1343 of this title;

* * * * * *

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit *as being outside the guidelines and requirements of this chapter.*

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SECTION 501

§ 1361. Administration.

(a) Authority of Administrator to prescribe regulations.

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

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SECTION 505

§ 1365. Citizen suits.

(a) Authorization; jurisdiction.

Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) *an effluent standard or limitation under this chapter* or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

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(f) Effluent standard or limitation.

For purposes of this section, *the term "effluent standard or limitation under this chapter" means* (1) effective July 1, 1973, an unlawful act under subsection (a) of section 1311 of this title; (2) *an effluent limitation or other limitation under section 1311* or 1312 of this title; (3) standard of performance under section 1316 of this title; (4) prohibition, effluent standard or pretreatment standards under section 1317 of this title; (5) certification under section 1341 of this title; or (6) *a permit or condition thereof issued under section 1342 of this title,* which is in effect under this chapter (including a requirement applicable by reason of section 1323 of this title).

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SECTION 509

§ 1369. Administrative procedure and judicial review.

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(b)(1) *Review of the Administrator's action* (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) *in approving or promulgating any effluent limitation or other limitation under section 1311,* 1312, or 1316 of this title, and (F) *in issuing or denying any permit under section 1342 of this title,* may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

ADAMS, Circuit Judge (concurring):

Although I subscribe completely to the majority's decision to remand to the Environmental Protection Agency this administrative action, two concerns compel additional comment. The more troubling one is that the Court has been obliged to find the power of the Administrator to issue effluent limitations by a series of subtle inferences, rather than by reference to clear statutory language. Also disturbing is the manner in which the Administrator has exercised his statutory duty to consider the costs of pollution control technology in relation to the benefits of abating pollution.

This aspect of the Administrator's decision would seem to constitute another ground for remanding the Phase I iron and steel operation controls to the Administrator for further consideration.

I.

The Water Pollution Control Act of 1972 is an important environmental protection measure, one of several such critical laws enacted in recent years. It holds promise for the American people that within a reasonable time the lakes and rivers of this country will no longer be threatened by unpurified discharges of industrial and residential waste. The undertaking Congress proposed was technologically uncertain and likely to prove costly as new facilities would have to be installed and old practices would have to be abandoned in order to achieve the desirable objectives set forth in the law. Congress, nonetheless, viewed the problem of water pollution with a sense of urgency. It provided that effluent limitations for point sources compatible with the "best practicable control technology currently available" were to be achieved by July 1, 1977[1] and that limitations consonant with the "best available technology economically achievable" were to be attained by July 1, 1983.[2] The Act expresses the goal that the 1983 limitations provide for water quality suitable for the protection of fish and wildlife and for recreational use, as well, and that all discharge of pollutants into navigable waters be eliminated by 1985.[3]

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1. § 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) (Supp. III 1973).
2. *Id.* (b)(2)(A).
3. § 101(a), 33 U.S.C. § 1251(a) (Supp. III 1973).

The states were chiefly responsible for the administration of the prior Act.[4] In contrast, the 1972 Act vested the authority to issue permits for the discharge of pollutants in the federal Environmental Protection Agency (EPA).[5] States were empowered to impose more stringent regulations on dischargers,[6] and to exercise an initial veto on applications for federal permits,[7] but the responsibility for prescribing minimum standards was vested in the EPA.[8] The EPA, however, was authorized by Congress to delegate its permit-granting authority to the states subject to conditions and safeguards, including the retention in the EPA of power to establish basic guidelines with which each state's implementation plan was to comply.[9] Each permit issued under a state plan was to be subject to EPA review and veto.[10] And should a state plan become inconsistent with the national water pollution regulations, the EPA was given authority to resume control of the issuance of permits in that state.[11]

A critical issue common to this appeal and the *CPC* case[12] is the delegation to the states of the authority to

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4. 33 U.S.C. 1151 *et seq.* (1970), *as amended* 33 U.S.C. § 1251 *et seq.* (Supp. III 1973).
5. § 402(a), 33 U.S.C. § 1342(a) (Supp. III 1973).
6. § 510, 33 U.S.C. § 1370 (Supp. III 1973).
7. § 401(a)(1), 33 U.S.C. § 1341(a)(1) (Supp. III 1973).
8. § 402(c)(2), 33 U.S.C. § 1342(c)(2) (Supp. III 1973).
9. *Id.* (b), (c).
10. *Id.* (d).
11. *Id.* (c)(3).
12. *CPC International, Inc. v. Train,* 515 F.2d 1032 (8th Cir. 1975).

establish minimum standards for pollutant discharge. Two issues determine the outcome of this aspect of each decision: First, are the effluent limitations described in section 301 of the Act to be imposed by a separate set of regulations with which state-issued permits for discharge must comply, or are the effluent limitations to be embodied instance by instance in the terms of each individual permit? Second, if the effluent limitations are separate regulations, is the federal government or the state to issue those regulations?

The Eighth Circuit has interpreted the Act as imposing the effluent limitations as conditions in each permit issued by a state authority, albeit congruent with the federal guidelines. Judge Hunter, in his able analysis, demonstrates that effluent limitations are to be a separate set of regulations, distinct from the permits, and that these regulations are to issue from the EPA, not from the states.

Regardless of the merits of the respective positions of the Eighth Circuit and this Court, both have had to arrive at their divergent interpretations of this fundamental aspect of the Act by inferences from ancillary provisions, and by deciphering the legislative intent from reading scraps and bits of a convoluted legislative history.

The failure to provide a clear procedural structure on so basic a matter in the administration of the Act is disquieting. In one sense, the difficulty of interpretation imposed here is of little consequence; it is the work of the courts to explicate the laws, no matter how complex their structure. In this instance, however, statutory vagueness inflicts harm on the purposes of the Act and impels the courts to determine the allocation of author-

ity between the national and state governments in the administration of this program. The conflict of interpretation between the Circuits does not initiate, but certainly perpetuates confusion in the administration of the legislation. Under these circumstances, neither the states nor the Administrator, nor the industries and municipalities which are to be regulated by the Act, may be confident which agency possesses the legal authority to promulgate effluent limitations. The result of such incertitude is delay in the implementation of the substantive provisions of the Act while the concerned parties engage in costly litigation to determine the legal powers of each enforcement agency. Such controversy postpones the achievement of the Act's lofty objectives, and imposes a burden on the Courts of Appeals and the Supreme Court which they might have been spared by careful drafting.

In addition, the difficulty in interpretation impinges on the powers of the coordinate branches of government within the federal system. Ours is a cooperative federalism in which the states and the national government share responsibilities for many programs. The definition of the roles of the state and national governments in areas where they share concurrent powers is essentially a matter for Congress, not for the courts.[13] The failure to create clear boundaries for the authority of the states and the EPA has thrust upon the courts a responsibility to infer legislative intent from the disparate provisions of this complex legislation. The courts have not evaded

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13. *See Franklin Nat'l Bank v. New York*, 347 U.S. 373, 378-79, 74 S.Ct. 550, 98 L.Ed. 767 (1954); *Palmer v. Massachusetts*, 308 U.S. 79, 84, 60 S.Ct. 34, 84 L.Ed. 93 (1939). *Cf. Douglas v. City of Jeannette*, 319 U.S. 157, 162-63, 63 S.Ct. 877, 87 L.Ed. 1324 (1943).

their responsibility, but our disagreement with the Eighth Circuit underlines the extent to which the courts can write law, even in areas of Congressional authority, when there has been a failure to manifest legislative intent by clear statutory commands.

II.

The Administrator's exercise of his discretion in connection with the cost analysis is the nub of my second concern. Congress has delegated to the Environmental Protection Agency a far-reaching power to strike a balance between water quality and the economy. In framing the guidelines for 1977 effluent limitations for existing point sources, the Administrator is directed by law to consider the costs of pollution control technology in relation to the benefits of pollution abatement. A reviewing court, asked by petitioners to declare an administrative action "arbitrary" or "an abuse of discretion," is not to substitute its judgment for that of the agency. The Court must make a careful inquiry, however, to ascertain whether the decision of the agency was "based on a consideration of the relevant factors and whether there has been a clear error of judgment."[14] By this standard, set forth in *Citizens to Preserve Overton Park v. Volpe,* the conclusions of the Administrator with respect to the cost of applying the best practicable control technology would appear to be arbitrary. The record does not adequately demonstrate that his decision on the 1977 guidelines for existing point

14. *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416, 91 S.Ct. 814, 824, 28 L.Ed.2d 136 (1971); *Duquesne Light Co. v. EPA,* 522 F.2d 1186, 1192 (3d Cir. 1975).

sources was based on a consideration of all the relevant factors.

Section 304(b)(1)(B) instructs the Administrator to consider "the total cost of application of [the best practicable control technology currently available] in relation to the effluent reduction benefits to be achieved from such application . . ." when establishing guidelines for the 1977 effluent limitations.[15] The elements of the total cost of applying the technology are not identified in the law itself. However, the legislative history of the Act may be used to support the notion that the term "total costs of application" encompasses not only the expense of erecting pollution control facilities but also the "external cost of potential unemployment, dislocation, and rural area development sustained by the community. . . ."[16]

Having accounted for the total costs of applying the requisite technology, the Administrator must consider those costs in relation to the benefits to be achieved from the application of the technology. The Act does

15. 33 U.S.C. § 1314(b)(1)(B) (Supp. III 1973). We note that the specific mandate to consider costs in relation to benefits is limited to the 1977 existing point source standards and does not appear to apply to the 1983 standards under subsection (b)(2)(B) or to new sources under section 306(b)(1)(B). In those sections the Administrator is, however, admonished to take costs "into account" or "into consideration." The admonition may be taken to imply some kind of comparison of costs and benefits, although the proportionality between costs and benefits, indicated by section 304(b)(1)(B), would not seem to be required for these other sections.

16. *See* Library of Congress, Environmental Policy Division, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong., 1st Sess. 231 (Comm. Print 1973). (Remarks of Rep. Jones).

not mandate an exacting quantitative comparison in the form of a technical benefit/cost analysis. Nevertheless, from the remarks of Senator Muskie in support of the conference bill it appears that, with respect to the 1977 guidelines, the Act does require the Administrator to make an analysis sufficient to indicate that "the additional degree of effluent reduction is [not] wholly out of proportion to the costs of achieving such marginal level of reduction. . . ."[17]

There is no doubt that Congress understood the difficulty and perhaps even the impossibility of reducing to monetary terms all, or even many, of the benefits from moderating pollution.[18] The Administrator's duty is to make the difficult comparison of the quantified and the unquantifiable. Nonetheless, by directing the Administrator, when developing the guidelines for 1977, to consider the costs in relation to the benefits, even if only to the extent of determining that costs and benefits are not "wholly out of proportion," Congress may reasonably be understood to have required that the Administrator survey both costs and benefits thoroughly, each in the terms best suited to understanding its significance.

Costs and benefits could not be accurately compared, if the Administrator were to omit significant benefits, or significant costs, in evaluating pollution control technologies for 1977. Only on the basis of a comprehensive survey could the Administrator conscientiously determine that the costs and benefits of reducing

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17. *See id.* 170 (Remarks of Sen. Muskie). *Cf. id.* 1466 (Senate Report discussing the analysis of costs and benefits required by § 302).

18. *See id.* 1466.

pollution were in some way proportionate. Without the aid of such a survey, decisions might be rendered which distort the priorities intended by Congress.[19]

In this case, the Administrator has considered the plant costs of applying the control technology; however, his calculations in this respect are incomplete. In particular, he has assumed that all treatment facilities will be constructed on "green field" sites. Consequently, he has neglected to estimate any average costs for site clearance and preparation. Sites are assumed to need no extensive preparation such as rock excavation, pilings, drainage, grading, or tree removal. In addition, "[l]and acquisition costs are not included in cost estimates." Other costs not considered in the Administrator's calculations include the costs of expanding utility support systems and interconnecting utility runs. Although the steel companies have presented only conclusory assertions regarding the significance of these excluded costs, the Administrator would seem to be obliged by the Act to consider these items as part of

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19. Senator Muskie's references to the "additional degree of effluent reduction" and to "such marginal level of reduction" seem to indicate that the comparison required by Congress is not between total benefits and total costs, but between the costs and benefits attributable to each significant step in pollution abatement. Presumably an incremental analysis would avoid the risk of hidden imbalances between cost and benefit. Such imbalances could be of serious magnitude where, as here, major industries are the subjects of regulation. An incremental analysis would, of course, be more complex than a simple comparison of total costs and benefits. To the extent that estimates of total costs and benefits are aggregates of the costs and benefits of each step in the pollution abatement process, however, the basic data for incremental analysis should be readily available.

"the total cost of technology."[20] He cannot leave utterly out of account what might reasonably be expected to be significant cost factors.

If the Administrator is required to consider the external or secondary costs of applying the best practicable pollution control technology, it appears that he has also failed to satisfy the Act in this respect. Although a report commissioned by the Administrator[21] noted the possibility of some plant closings, which would create unemployment and dislocate local economies, the Administrator does not set forth the weight he attached to these considerations. Nor does he find the possibility of plant closings too remote to be considered. If some closings are reasonably foreseeable, the report cannot be said to have presented adequate estimates of the total cost of such eventualities. Similarly, the record does not reveal that the Administrator has discounted the necessity for a choice between expanded production capacity and the application of pollution con-

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20. The costs in question will vary according to the conditions of each site, and the Administrator cannot be expected to produce exact costs for each site. He may, however, resort to estimated average figures.

21. The Administrator appears to adopt the report and its supplement by his statement at 39 Fed.Reg. 24118 (1974) that "[t]he total cost of implementing the effluent limitations guidelines includes . . . the indirect economic costs identified in . . . the supplementary report entitled "Economic Analysis of the Proposed Effluent Guidelines for the Integrated Iron and Steel Industry" (February 1974). The Administrator does not appear to engage in any more detailed discussion of indirect costs in the Final Development Document.

trol technology.[22] If such a choice must be made, the Administrator should examine the possibility of any substantial economic impact associated with it. To the extent that Congress intended "total costs" to include secondary costs, the Administrator, it seems to me, should give explicit consideration to whether such costs, if they are significant, are likely to be passed on to other industries and ultimately to consumers.

Where costs are to be evaluated "in relation to" the benefits of reducing pollution, as in the case of the

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22. As justification for a determination that there is no need for an investment choice between expansion of capacity and pollution control, the Administrator submits newspaper articles on the financial condition of the steel industry that have appeared subsequent to the promulgation of the regulations. The Court accepts those materials, relying on the reasoning of *Amoco Oil Co. v. EPA*, 163 U.S.App.D.C. 162, 501 F.2d 722, 729 n.10 (1974). In the circumstances of this case, where the regulations are to be remanded to the Administrator for reconsideration in many respects, it appears to be unnecessary and perhaps inappropriate for the Court to take notice in this fashion of subsequently developed information.

As a general principle, moreover, it is disturbing that courts should consider subsequently developed information to determine whether an administrative decision is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." To entertain such information may encourage the use of the courts as mere extensions of a continuous administrative process. It may also encourage some administrators to issue decisions that may well be arbitrary at the time of promulgation, hoping like Micawber that "something will turn up." Neither of these consequences would appear to enhance the efficiency of the courts or the confidence of citizens in the fairness of the administrative process. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196, 67 S.Ct. 1760, 91 L.Ed. 1995 (1947); *SEC v. Chenery Corp.*, 318 U.S. 80, 94-95, 63 S.Ct. 454, 87 L.Ed. 626 (1943).

1977 guidelines, the Administrator should survey the extent of the benefits as well as the costs that the pollution control technology may be expected to provide. The Final Development Document, however, describes only the types of harm that pollution control technology will help to abate. It does not account for the extent of the injury to be alleviated by the control technology. Consequently, it cannot be ascertained from the record whether the benefits to be attained are substantial.

The Administrator has concluded that "the benefits of reducing the pollutants discharged justify the associated costs . . ." of applying pollution control technology to Phase I iron and steel operations.[23] However, the failure of the Administrator to account fully for the costs of the control technology and to indicate in any way the extent of the benefits to be derived from reducing pollution, would seem to preclude meaningful comparison of costs and benefits. Any conclusions drawn from inadequate data would be without foundation. In view of these omissions, the Administrator's determination cannot be said to be based on a consideration of the relevant factors. Accordingly, it would not appear to meet the test of *Overton Park*.[24] It is quite conceivable that if all the facts were set forth, the Administrator's determination would not be a "clear error of judgment." But it is not the function of the appellate courts to "supply a reasoned basis for the agency's action."[25] Although courts are obliged to uphold an Administrator's position when the path to his decision is reasonably discernible,[26] the proceeding here presents this Court with an unblazed trail.

23. 39 Fed.Reg. 24118 (1974).

24. 401 U.S. at 416, 91 S.Ct. 814.

25. *See Bowman Transportation, Inc. v. Arkansas-Best Freight Systems, Inc.*, 419 U.S. 281, 285-86, 95 S.Ct. 438, 442, 42 L.Ed.2d 447 (1974).

It is no small matter to which the Administrator is to direct his attention. A decision to protect the environment necessarily imposes heavy costs on the accustomed ways of production, employment, and consumption in this country. In passing the Water Pollution Control Act of 1972, Congress attempted to balance the improvement in the quality of our water with the costs of that worthy endeavor. Despite the ambitious goals expressed in section 101 of the Act, Congress has ordained a measured national effort at the first stage of enforcement, from 1977 to 1983, requiring pollution abatement at existing point sources to be bounded by some proportionality to its cost. The guidelines and effluent limitations to be established by the Administrator have the potential to affect management's investment decisions and, thereby, the employment prospects of thousands of citizens and the economic future of many communities. When an administrator's action has such ramifications, he would appear to have an obligation to move cautiously, taking care that his judgments at each important step of the way are founded on sound analysis and detailed study. It does not appear that the Administrator has acted with care sufficient to satisfy his obligations under section 304(b)(1)(B). For that reason I conclude that the inadequate consideration of the element of cost in setting the guidelines for best practicable control technology is an additional ground for remanding this action to the Administrator.

26. *See id.* 286, 95 S.Ct. 438.

Federal Water Pollution Control Act Amendments of 1972

§ 1251. Congressional declaration of goals and policy.

(a) The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation's waters. In order to achieve this objective it is hereby declared that, consistent with the provisions of this chapter—

(1) it is the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985;

(2) it is the national goal that wherever attainable, an interim goal of water quality which provides for the protection and propagation of fish, shellfish, and wildlife and provides for recreation in and on the water be achieved by July 1, 1983;

(3) it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited;

(4) it is the national policy that Federal financial assistance be provided to construct publicly owned waste treatment works;

(5) it is the national policy that areawide waste treatment management planning processes be developed and implemented to assure adequate control of sources of pollutants in each State; and

(6) it is the national policy that a major research and demonstration effort be made to develop technology necessary to eliminate the discharge of pollutants into the navigable waters, waters of the contiguous zone, and the oceans.

(b) It is the policy of the Congress to recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, to plan the development and use (including restoration, preservation, and enhancement) of land and water resources, and to consult with the Administrator in the exercise of his authority under

this chapter. It is further the policy of the Congress to support and aid research relating to the prevention, reduction, and elimination of pollution and to provide Federal technical services and financial aid to State and interstate agencies and municipalities in connection with the prevention, reduction, and elimination of pollution.

(c) It is further the policy of Congress that the President, acting through the Secretary of State and such national and international organizations as he determines appropriate, shall take such action as may be necessary to insure that to the fullest extent possible all foreign countries shall take meaningful action for the prevention, reduction, and elimination of pollution in their waters and in international waters and for the achievement of goals regarding the elimination of discharge of pollutants and the improvement of water quality to at least the same extent as the United States does under its laws.

(d) Except as otherwise expressly provided in this chapter, the Administrator of the Environmental Protection Agency (hereinafter in this chapter called "Administrator") shall administer this chapter.

(e) Public participation in the development, revision, and enforcement of any regulation, standard, effluent limitation, plan, or program established by the Administrator or any State under this chapter shall be provided for, encouraged, and assisted by the Administrator and the States. The Administrator, in cooperation with the States, shall develop and publish regulations specifying minimum guidelines for public participation in such processes.

(f) It is the national policy that to the maximum extent possible the procedures utilized for implementing this chapter shall encourage the drastic minimization of paperwork and interagency decision

procedures, and the best use of available manpower and funds, so as to prevent needless duplication and unnecessary delays at all levels of government. (June 30, 1948, ch. 758, title I, § 101, as added Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 816.)

§ 1311. Effluent limitations.

(a) Illegality of pollutant discharges except in compliance with law.

Except as in compliance with this section and sections 1312, 1316, 1317, 1328, 1342, and 1344 of this title, the discharge of any pollutant by any person shall be unlawful.

(b) Timetable for achievement of objectives.

In order to carry out the objective of this chapter there shall be achieved—

(1) (A) not later than July 1, 1977, effluent limitations for point sources, other than publicly owned treatment works, (i) which shall require the application of the best practicable control technology currently available as defined by the Administrator pursuant to section 1314(b) of this title, or (ii) in the case of a discharge into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, which shall require compliance with any applicable pretreatment requirements and any requirements under section 1317 of this title; and

(B) for publicly owned treatment works in existence on July 1, 1977, or approved pursuant to section 1283 of this title prior to June 30, 1974 (for which construction must be completed within four years of approval), effluent limitations based upon secondary treatment as defined by the Administrator pursuant to section 1314(d)(1) of this title; or,

(C) not later than July 1, 1977, any more stringent limitation, including those necessary to meet water quality standards, treatment standards, or schedules of compliance, established pursuant to any State law or regulations (under authority preserved by section 1370 of this title) or any other Federal law or regulation, or required to implement any applicable water quality standard established pursuant to this chapter.

(2)(A) not later than July 1, 1983, effluent limitations for categories and classes of point sources, other than publicly owned treament works, which (i) shall require application of the best available technology economically achievable for such category or class, which will result in reasonable further progress toward the national goal of eliminating the discharge of all pollutants, as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, which such effluent limitations shall require the elimination of discharges of all pollutants if the Administrator finds, on the basis of information available to him (including information developed pursuant to section 1325 of this title), that such elimination is technologically and economically achievable for a category or class of point sources as determined in accordance with regulations issued by the Administrator pursuant to section 1314(b)(2) of this title, or (ii) in the case of the introduction of a pollutant into a publicly owned treatment works which meets the requirements of subparagraph (B) of this paragraph, shall require compliance with any applicable pretreatment requirements and any other requirement under section 1317 of this title; and

(B) not later than July 1, 1983, compliance by all publicly owned treatment works with the requirements set forth in section 1281(g)(2)(A) of this title.

(c) Modification of timetable.

The Administrator may modify the requirements of subsection (b)(2)(A) of this section with respect to any point source for which a permit application is filed after July 1, 1977, upon a showing by the owner or operator of such point source satisfactory to the Administrator that such modified requirements (1) will represent the maximum use of technology within the economic capability of the owner or operator; and (2) will result in reasonable further progress toward the elimination of the discharge of pollutants.

(d) Review and revision of effluent limitations.

Any effluent limitation required by paragraph (2) of subsection (b) of this section shall be reviewed at least every five years and, if appropriate, revised pursuant to the procedure established under such paragraph.

(e) All point discharge source application of effluent limitations.

Effluent limitations established pursuant to this section or section 1312 of this title shall be applied to all point sources of discharge of pollutants in accordance with the provisions of this chapter.

(f) Illegality of discharge of radiological, chemical, or biological warfare agents or high-level radioactive waste.

Notwithstanding any other provisions of this chapter it shall be unlawful to discharge any radiological, chemical, or biological warfare agent or high-level radioactive waste into the navigable waters. (June 30, 1948, ch. 758, title III, § 301, as added Oct. 18, 1972, Pub. L. 92–500, § 2, 86 Stat. 844.)

§ 1314. Information and guidelines.

(a) Criteria development and publication.

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) criteria for water quality accurately reflecting the latest scientific knowledge (A) on the kind and extent of all identifiable effects on health and welfare including, but not limited to, plankton, fish, shellfish, wildlife, plant life, shorelines, beaches, esthetics, and recreation which may be expected from the presence of pollutants in any body of water, including ground water; (B) on the concentration and dispersal of pollutants, or their byproducts, through biological, physical, and chemical processes; and (C) on the effects of pollutants on biological community diversity, productivity, and stability, including information on the factors affecting rates of eutrophication and rates of organic and inorganic sedimentation for varying types of receiving waters.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall develop and publish, within one year after October 18, 1972 (and from time to time thereafter revise) information (A) on the factors necessary to restore and maintain the chemical, physical, and biological integrity of all navigable waters, ground waters, waters of the contiguous zone, and the oceans; (B) on the factors necessary for the protection and propagation of shellfish, fish, and wildlife for classes and categories of receiving waters and to allow recreational activities in and on the water; and (C) on the measurement and classification of water quality; and (D) for the purpose of section 1313 of this title, on and the identification of pollutants suitable for maximum daily load measurement correlated with the achievement of water quality objectives.

(3) Such criteria and information and revisions thereof shall be issued to the States and shall be published in the Federal Register and otherwise made available to the public.

(b) Effluent limitation guidelines.

For the purpose of adopting or revising effluent limitations under this chapter the Administrator shall, after consultation with appropriate Federal and State agencies and other interested persons, publish within one year of October 18, 1972, regulations, providing guidelines for effluent limitations, and, at least annually thereafter, revise, if appropriate, such regulations. Such regulations shall—

(1)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best practicable control technology currently available for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the control measures and practices to be applicable to point sources (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best practicable control technology currently available to comply with subsection (b)(1) of section 1311 of this title shall include consideration of the total cost of application of technology in relation to the effluent reduction benefits to be achieved from such application, and shall also take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate;

(2)(A) identify, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, the degree of effluent reduction attainable through the application of the best control measures and practices achievable including treatment techniques, process and procedure innovations, operating methods, and other alternatives for classes and categories of point sources (other than publicly owned treatment works); and

(B) specify factors to be taken into account in determining the best measures and practices available to comply with subsection (b)(2) of section 1311 of this title to be applicable to any point source (other than publicly owned treatment works) within such categories or classes. Factors relating to the assessment of best available technology shall take into account the age of equipment and facilities involved, the process employed, the engineering aspects of the application of various types of control techniques, process changes, the cost of achieving such effluent reduction, non-water quality environmental impact (including energy requirements), and such other factors as the Administrator deems appropriate; and

(3) identify control measures and practices available to eliminate the discharge of pollutants from categories and classes of point sources, taking into account the cost of achieving such elimination of the discharge of pollutants.

(c) Pollution discharge elimination procedures.

The Administrator, after consultation, with appropriate Federal and State agencies and other interested persons, shall issue to the States and appropriate water pollution control agencies within 270 days after October 18, 1972 (and from time to time thereafter) information on the processes, procedures, or operating methods which result in the elimination or reduction of the discharge of pollutants to implement standards of performance under section 1316 of this title. Such information shall include technical and other data, including costs, as are available on alternative methods of elimination or reduction of the discharge of pollutants. Such information,

and revisions thereof, shall be published in the Federal Register and otherwise shall be made available to the public.

(d) Secondary treatment information; alternative waste treatment management techniques and systems.

(1) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within sixty days after October 18, 1972 (and from time to time thereafter) information, in terms of amounts of constituents and chemical, physical, and biological characteristics of pollutants, on the degree of effluent reduction attainable through the application of secondary treatment.

(2) The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall publish within nine months after October 18, 1972 (and from time to time thereafter) information on alternative waste treatment management techniques and systems available to implement section 1281 of this title.

(e) Identification and evaluation of nonpoint sources of pollution; processes, procedures, and methods to control pollution.

The Administrator, after consultation with appropriate Federal and State agencies and other interested persons, shall issue to appropriate Federal agencies, the States, water pollution control agencies, and agencies designated under section 1288 of this title, within one year after October 18, 1972 (and from time to time thereafter) information including

(1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from—

(A) agricultural and silvicultural activities, including runoff from fields and crop and forest lands;

(B) mining activities, including runoff and siltation from new, currently operating, and abandoned surface and underground mines;

(C) all construction activity, including runoff from the facilities resulting from such construction;

(D) the disposal of pollutants in wells or in subsurface excavations;

(E) salt water intrusion resulting from reductions of fresh water flow from any cause, including extraction of ground water, irrigation, obstruction, and diversion; and

(F) changes in the movement, flow, or circulation of any navigable waters or ground waters, including changes caused by the construction of dams, levees, channels, causeways, or flow diversion facilities.

Such information and revisions thereof shall be published in the Federal Register and otherwise made available to the public.

(f) Guidelines for pretreatment of pollutants.

(1) For the purpose of assisting States in carrying out programs under section 1342 of this title, the Administrator shall publish, within one hundred and twenty days after October 18, 1972, and review at least annually thereafter and, if appropriate, revise guidelines for pretreatment of pollutants which

he determines are not susceptible to treatment by publicly owned treatment works. Guidelines under this subsection shall be established to control and prevent the discharge into the navigable waters, the contiguous zone, or the ocean (either directly or through publicly owned treatment works) of any pollutant which interferes with, passes through, or otherwise is incompatible with such works.

(2) When publishing guidelines under this subsection, the Administrator shall designate the category or categories of treatment works to which the guidelines shall apply.

(g) Test procedures guidelines.

The Administrator shall, within one hundred and eighty days from October 18, 1972, promulgate guidelines establishing test procedures for the analysis of pollutants that shall include the factors which must be provided in any certification pursuant to section 1341 of this title or permit application pursuant to section 1342 of this title.

(h) Guidelines for monitoring, reporting, enforcement, funding, personnel, and manpower.

The Administrator shall (1) within sixty days after October 18, 1972, promulgate guidelines for the purpose of establishing uniform application forms and other minimum requirements for the acquisition of information from owners and operators of point-sources of discharge subject to any State program under section 1342 of this title, and (2) within sixty days from October 18, 1972, promulgate guidelines

establishing the minimum procedural and other elements of any State program under section 1342 of this title, which shall include:

(A) monitoring requirements:

(B) reporting requirements (including procedures to make information available to the public);

(C) enforcement provisions; and

(D) funding, personnel qualifications, and manpower requirements (including a requirement that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit).

(i) Restoration and enhancement of publicly owned fresh water lakes.

The Administrator shall, within 270 days after October 18, 1972 (and from time to time thereafter), issue such information on methods, procedures, and processes as may be appropriate to restore and enhance the quality of the Nation's publicly owned fresh water lakes.

(j) Agreements with Secretaries of Agriculture, Army, and Interior to provide maximum utilization of programs to achieve and maintain water quality; transfer of funds; authorization of appropriations.

(1) The Administrator shall, within six months from October 18, 1972, enter into agreements with the Secretary of Agriculture, the Secretary of the Army, and the Secretary of the Interior to provide

for the maximum utilization of the appropriate programs authorized under other Federal law to be carried out by such Secretaries for the purpose of achieving and maintaining water quality through appropriate implementation of plans approved under section 1288 of this title.

(2) The Administrator, pursuant to any agreement under paragraph (1) of this subsection is authorized to transfer to the Secretary of Agriculture, the Secretary of the Army, or the Secretary of the Interior any funds appropriated under paragraph (3) of this subsection to supplement any funds otherwise appropriated to carry out appropriate programs authorized to be carried out by such Secretaries.

(3) There is authorized to be appropriated to carry out the provisions of this subsection, $100,000,000 per fiscal year for the fiscal year ending June 30, 1973, and the fiscal year ending June 30, 1974. (June 30, 1948, ch. 758, title III, § 304, as added Oct. 18, 1972, Pub. L. 92–500, § 2, 86 Stat. 850.)

§ 1341. Certification.

(a) Compliance with applicable requirements; application; procedures; license suspension.

(1) Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate, or, if appropriate, from the interstate water pollution control agency having jurisdiction over the navigable waters at the point where the discharge originates or will

originate, that any such discharge will comply with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title. In the case of any such activity for which there is not an applicable effluent limitation or other limitation under sections 1311(b) and 1312 of this title, and there is not an applicable standard under sections 1316 and 1317 of this title, the State shall so certify, except that any such certification shall not be deemed to satisfy section 1371 (c) of this title. Such State or interstate agency shall establish procedures for public notice in the case of all applications for certification by it and, to the extent it deems appropriate, procedures for public hearings in connection with specific applications. In any case where a State or interstate agency has no authority to give such a certification, such certification shall be from the Administrator. If the State, interstate agency, or Administrator, as the case may be, fails or refuses to act on a request for certification, within a reasonable period of time (which shall not exceed one year) after receipt of such request, the certification requirements of this subsection shall be waived with respect to such Federal application. No license or permit shall be granted until the certification required by this section has been obtained or has been waived as provided in the preceding sentence. No license or permit shall be granted if certification has been denied by the State, interstate agency, or the Administrator, as the case may be.

(2) Upon receipt of such application and certification the licensing or permitting agency shall immediately notify the Administrator of such application and certification. Whenever such a discharge may affect, as determined by the Administrator, the

quality of the waters of any other State, the Administrator within thirty days of the date of notice of application for such Federal license or permit shall so notify such other State, the licensing or permitting agency, and the applicant. If, within sixty days after receipt of such notification, such other State determines that such discharge will affect the quality of its waters so as to violate any water quality requirements in such State, and within such sixty-day period notifies the Administrator and the licensing or permitting agency in writing of its objection to the issuance of such license or permit and requests a public hearing on such objection, the licensing or permitting agency shall hold such a hearing. The Administrator shall at such hearing submit his evaluation and recommendations with respect to any such objection to the licensing or permitting agency. Such agency, based upon the recommendations of such State, the Administrator, and upon any additional evidence, if any, presented to the agency at the hearing, shall condition such license or permit in such manner as may be necessary to insure compliance with applicable water quality requirements. If the imposition of conditions cannot insure such compliance such agency shall not issue such license or permit.

(3) The certification obtained pursuant to paragraph (1) of this subsection with respect to the construction of any facility shall fulfill the requirements of this subsection with respect to certification in connection with any other Federal license or permit required for the operation of such facility unless, after notice to the certifying State, agency, or Administrator, as the case may be, which shall be given by the Federal agency to whom application is made for such operating license or permit, the State, or if

appropriate, the interstate agency or the Administrator, notifies such agency within sixty days after receipt of such notice that there is no longer reasonable assurance that there will be compliance with the applicable provisions of sections 1311, 1312, 1316, and 1317 of this title because of changes since the construction license or permit certification was issued in (A) the construction or operation of the facility, (B) the characteristics of the waters into which such discharge is made, (C) the water quality criteria applicable to such waters or (D) applicable effluent limitations or other requirements. This paragraph shall be inapplicable in any case where the applicant for such operating license or permit has failed to provide the certifying State, or, if appropriate, the interstate agency or the Administrator, with notice of any proposed changes in the construction or operation of the facility with respect to which a construction license or permit has been granted, which changes may result in violation of section 1311, 1312, 1316, or 1317 of this title.

(4) Prior to the initial operation of any federally licensed or permitted facility or activity which may result in any discharge into the navigable waters and with respect to which a certification has been obtained pursuant to paragraph (1) of this subsection, which facility or activity is not subject to a Federal operating license or permit, the licensee or permittee shall provide an opportunity for such certifying State, or, if appropriate, the interstate agency or the Administrator to review the manner in which the facility or activity shall be operated or conducted for the purposes of assuring that applicable effluent limitations or other limitations or other applicable water quality requirements will not be violated. Upon

notification by the certifying State, or if appropriate, the interstate agency or the Administrator that the operation of any such federally licensed or permitted facility or activity will violate applicable effluent limitations or other limitations or other water quality requirements such Federal agency may, after public hearing, suspend such license or permit. If such license or permit is suspended, it shall remain suspended until notification is received from the certifying State, agency, or Administrator, as the case may be, that there is reasonable assurance that such facility or activity will not violate the applicable provisions of section 1311, 1312, 1316, or 1317 of this title.

(5) Any Federal license or permit with respect to which a certification has been obtained under paragraph (1) of this subsection may be suspended or revoked by the Federal agency issuing such license or permit upon the entering of a judgment under this chapter that such facility or activity has been operated in violation of the applicable provisions of section 1311, 1312, 1316, or 1317 of this title.

(6) No Federal agency shall be deemed to be an applicant for the purposes of this subsection.

(7) Except with respect to a permit issued under section 1342 of this title, in any case where actual construction of a facility has been lawfully commenced prior to April 3, 1970, no certification shall be required under this subsection for a license or permit issued after April 3, 1970, to operate such facility, except that any such license or permit issued without certification shall terminate April 3, 1973, unless prior to such termination date the person having such license or permit submits to the Federal agency which issued such license or permit a certification and otherwise meets the requirements of this section.

(b) Compliance with other provisions of law setting applicable water quality requirements.

Nothing in this section shall be construed to limit the authority of any department or agency pursuant to any other provision of law to require compliance with any applicable water quality requirements. The Administrator shall, upon the request of any Federal department or agency, or State or interstate agency, or applicant, provide, for the purpose of this section, any relevant information on applicable effluent limitations, or other limitations, standards, regulations, or requirements, or water quality criteria, and shall, or State or interstate agency, or applicant, comment when requested by any such department or agency on any methods to comply with such limitations, standards, regulations, requirements, or criteria.

(c) Authority of Secretary of the Army to permit use of spoil disposal areas by Federal licensees or permittees.

In order to implement the provisions of this section, the Secretary of the Army, acting through the Chief of Engineers, is authorized, if he deems it to be in the public interest, to permit the use of spoil disposal areas under his jurisdiction by Federal licensees or permittees, and to make an appropriate charge for such use. Moneys received from such licensees or permittees shall be deposited in the Treasury as miscellaneous receipts.

(d) Limitations and monitoring requirements of certification.

Any certification provided under this section shall set forth any effluent limitations and other limitations, and monitoring requirements necessary to

assure that any applicant for a Federal license or permit will comply with any applicable effluent limitations and other limitations, under section 1311 or 1312 of this title, standard of performance under section 1316 of this title, or prohibition, effluent standard, or pretreatment standard under section 1317 of this title, and with any other appropriate requirement of State law set forth in such certification, and shall become a condition on any Federal license or permit subject to the provisions of this section. (June 30, 1948, ch. 758, title IV, § 401, as added Oct. 18, 1972, Pub. L 92–500, § 2, 86 Stat. 877.)

§ 1342. National pollutant discharge elimination system.

(a) Permits for discharge of pollutants.

(1) Except as provided in sections 1328 and 1344 of this title, the Administrator may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

(2) The Administrator shall prescribe conditions for such permits to assure compliance with the requirements of paragraph (1) of this subsection, including conditions on data and information collection, reporting, and such other requirements as he deems appropriate.

(3) The permit program of the Administrator under paragraph (1) of this subsection, and permits issued thereunder, shall be subject to the same terms, conditions, and requirements as apply to a State permit program and permits issued thereunder under subsection (b) of this section.

(4) All permits for discharges into the navigable waters issued pursuant to section 407 of this title shall be deemed to be permits issued under this subchapter, and permits issued under this subchapter shall be deemed to be permits issued under section 407 of this title, and shall continue in force and effect for their term unless revoked, modified, or suspended in accordance with the provisions of this chapter.

(5) No permit for a discharge into the navigable waters shall be issued under section 407 of this title after October 18, 1972. Each application for a permit under section 407 of this title, pending on October 18, 1972, shall be deemed to be an application for a permit under this section. The Administrator shall authorize a State, which he determines has the capability of administering a permit program which will carry out the objectives of this chapter to issue permits for discharges into the navigable waters within the jurisdiction of such State. The Administrator may exercise the authority granted him by the preceding sentence only during the period which begins on October 18, 1972, and ends either on the ninetieth day after the date of the first promulgation of guidelines required by section 1314(h)(2) of this title, or the date of approval by the Administrator of a permit program for such State under subsection (b) of this section, whichever date first occurs, and no such authorization to a State shall extend beyond the last day of such period. Each

such permit shall be subject to such conditions as the Administrator determines are necessary to carry out of the provisions of this chapter. No such permit shall issue if the Administrator objects to such issuance.

(b) State permit programs.

At any time after the promulgation of the guidelines required by subsection (h)(2) of section 1314 of this title, the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administration a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. In addition, such State shall submit a statement from the attorney general (or the attorney for those State water pollution control agencies which have independent legal counsel), or from the chief legal officer in the case of an interstate agency, that the laws of such State, or the interstate compact, as the case may be, provide adequate authority to carry out the described program. The Administrator shall approve each submitted program unless he determines that adequate authority does not exist:

(1) To issue permits which—

(A)—apply, and insure compliance with, any applicable requirements of sections 1311, 1312, 1316, 1317, and 1343 of this title;

(B) are for fixed terms not exceeding five years; and

(C) can be terminated or modified for cause including, but not limited to, the following:

(i) violation of any condition of the permit;

(ii) obtaining a permit by misrepresentation, or failure to disclose all relevant facts;

(iii) change in any condition that requires either a temporary or permanent reduction or elimination of the permitted discharge;

(D) control the disposal of pollutants into wells;

(2)(A) To issue permits which apply, and insure compliance with, all applicable requirements of section 1318 of this title; or

(B) To inspect, monitor, enter, and require reports to at least the same extent as required in section 1318 of this title;

(3) To insure that the public, and any other State the waters of which may be affected, receive notice of each application for a permit and to provide an opportunity for public hearing before a ruling on each such application;

(4) To insure that the Administrator receives notice of each application (including a copy thereof) for a permit;

(5) To insure that any State (other than the permitting State), whose waters may be affected by the issuance of a permit may submit written recommendations to the permitting State (and the Administrator) with respect to any permit application and, if any part of such written recommendations are not accepted by the permitting State, that the permitting State will notify such affected State (and the Administrator) in writing of its failure to so accept such recommendations together with its reasons for so doing;

(6) To insure that no permit will be issued if, in the judgment of the Secretary of the Army acting through the Chief of Engineers, after consultation with the Secretary of the department in which the

Coast Guard is operating, anchorage and navigation of any of the navigable waters would be substantially impaired thereby;

(7) To abate violations of the permit or the permit program, including civil and criminal penalties and other ways and means of enforcement;

(8) To insure that any permit for a discharge from a publicly owned treatment works includes conditions to require adequate notice to the permitting agency of (A) new introductions into such works of pollutants from any source which would be a new source as defined in section 1316 of this title if such source were discharging pollutants, (B) new introductions of pollutants into such works from a source which would be subject to section 1311 of this title if it were discharging such pollutants, or (C) a substantial change in volume or character of pollutants being introduced into such works by a source introducing pollutants into such works at the time of issuance of the permit. Such notice shall include information on the quality and quantity of effluent to be introduced into such treatment works and any anticipated impact of such change in the quantity or quality of effluent to be discharged from such publicly owned treatment works; and

(9) To insure that any industrial user of any publicly owned treatment works will comply with sections 1284(b), 1317, and 1318 of this title.

(c) Suspension of federal program upon submission of State program; withdrawal of approval of State program.

(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section,

the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 1314(h)(2) of this title. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

(2) Any State permit program under this section shall at all times be in accordance with this section and guidelines promulgated pursuant to section 1314(h)(2) of this title.

(3) Whenever the Administrator determines after public hearing that a State is not administering a program approved under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw approval of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

(d) Notification of Administrator.

(1) Each State shall transmit to the Administrator a copy of each permit application received by such State and provide notice to the Administrator of every action related to the consideration of such permit application, including each permit proposed to be issued by such State.

(2) No permit shall issue (A) if the Administrator within ninety days of the date of his notification under subsection (b)(5) of this section objects in writing to the issuance of such permit, or (B) if the

Administrator within ninety days of the date of transmittal of the proposed permit by the State objects in writing to the issuance of such permit as being outside the guidelines and requirements of this chapter.

(3) The Administrator may, as to any permit application, waive paragraph (2) of this subsection.

(e) Waiver of notification requirement.

In accordance with guidelines promulgated pursuant to subsection (h)(2) of section 1314 of this title, the Administrator is authorized to waive the requirements of subsection (d) of this section at the time he approves a program pursuant to subsection (b) of this section for any category (including any class, type, or size within such category) of point sources within the State submitting such program.

(f) Point source categories.

The Administrator shall promulgate regulations establishing categories of point sources which he determines shall not be subject to the requirements of subsection (d) of this section in any State with a program approved pursuant to subsection (b) of this section. The Administrator may distinguish among classes, types, and sizes within any category of point sources.

(g) Other regulations for safe transportation, handling, carriage, storage, and stowage of pollutants.

Any permit issued under this section for the discharge of pollutants into the navigable waters from a vessel or other floating craft shall be subject to any applicable regulations promulgated by the Secretary of the department in which the Coast Guard

is operating, establishing specifications for safe transportation, handling, carriage, storage, and stowage of pollutants.

(h) Violation of permit conditions; restriction or prohibition upon introduction of pollutant by source not previously utilizing treatment works.

In the event any condition of a permit for discharges from a treatment works (as defined in section 1292 of this title) which is publicly owned is violated, a State with a program approved under subsection (b) of this section or the Administrator, where no State program is approved, may proceed in a court of competent jurisdiction to restrict or prohibit the introduction of any pollutant into such treatment works by a source not utilizing such treatment works prior to the finding that such condition was violated.

(i) Federal enforcement not limited.

Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section 1319 of this title.

(j) Public information.

A copy of each permit application and each permit issued under this section shall be available to the public. Such permit application or permit, or portion thereof, shall further be available on request for the purpose of reproduction.

(k) Compliance with permits.

Compliance with a permit issued pursuant to this section shall be deemed compliance, for purposes of sections 1319 and 1365 of this title, with sections 1311, 1312, 1316, 1317, and 1343 of this title, except any

standard imposed under section 1317 of this title for a toxic pollutant injurious to human health. Until December 31, 1974, in any case where a permit for discharge has been applied for pursuant to this section, but final administrative disposition of such application has not been made, such discharge shall not be a violation of (1) section 1311, 1316, or 1342 of this title, or (2) section 407 of this title, unless the Administrator or other plaintiff proves that final administrative disposition of such application has not been made because of the failure of the applicant to furnish information reasonably required or requested in order to process the application. For the 180-day period beginning on October 18, 1972, in the case of any point source discharging any pollutant or combination of pollutants immediately prior to such date which source is not subject to section 407 of this title, the discharge by such source shall not be a violation of this chapter if such a source applies for a permit for discharge pursuant to this section within such 180-day period. (June 30, 1948, ch. 758, title IV, § 402, as added Oct. 18, 1972, Pub. L. 92–500, § 2, 86 Stat. 880.)

§ 1361. Administration.

(a) Authority of Administrator to prescribe regulations.

The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter.

(b) Utilization of other agency officers and employees.

The Administrator, with the consent of the head of any other agency of the United States, may utilize such officers and employees of such agency as may be found necessary to assist in carrying out the purposes of this chapter.

(c) Recordkeeping.

Each recipient of financial assistance under this chapter shall keep such records as the Administrator shall prescribe, including records which fully disclose the amount and disposition by such recipient of the proceeds of such assistance, the total cost of the project or undertaking in connection with which such assistance is given or used, and the amount of that portion of the cost of the project or undertaking supplied by other sources, and such other records as will facilitate effective audit.

(d) Audit.

The Administrator and the Comptroller General of the United States, or any of their duly authorized representatives, shall have access, for the purpose of audit and examination, to any books, documents, papers, and records of the recipients that are pertinent to the grants received under this chapter.

(e) Awards for outstanding technological achievement or innovative processes, methods, or devices in waste treatment and pollution abatement programs.

(1) It is the purpose of this subsection to authorize a program which will provide official recognition by the United States Government to those industrial organizations and political subdivisions of States which during the preceding year demonstrated an outstanding technological achievement or an innovative process, method, or device in their waste treatment and pollution abatement programs. The Administrator shall, in consultation with the appropriate State water pollution control agencies, establish regulations under which such recognition may

be applied for and granted, except that no applicant shall be eligible for an award under this subsection if such applicant is not in total compliance with all applicable water quality requirements under this chapter, or otherwise does not have a satisfactory record with respect to environmental quality.

(2) The Administrator shall award a certificate or plaque of suitable design to each industrial organization or political subdivision which qualifies for such recognition under regulations established under this subsection.

(3) The President of the United States, the Governor of the appropriate State, the Speaker of the House of Representatives, and the President pro tempore of the Senate shall be noified of the award by the Administrator and the awarding of such recognition shall be published in the Federal Register.

(f) Detail of Environmental Protection Agency personnel to State water pollution control agencies.

Upon the request of a State water pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter. (June 30, 1948, ch. 758, title V, § 501, as added Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 885.)

§ 1362. Definitions.

Except as otherwise specifically provided, when used in this chapter:

(1) The term "State water pollution control agency" means the State agency designated by the Governor having responsibility for enforcing State laws relating to the abatement of pollution.

(2) The term "interstate agency" means an agency of two or more States established by or pursuant to an agreement or compact approved by the Congress, or any other agency of two or more States, having substantial powers or duties pertaining to the control of pollution as determined and approved by the Administrator.

(3) The term "State" means a State, the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Trust Territory of the Pacific Islands.

(4) The term "municipality" means a city, town, borough, county, parish, district, association, or other public body created by or pursuant to State law and having jurisdiction over disposal of sewage, industrial wastes, or other wastes, or an Indian tribe or an authorized Indian tribal organization, or a designated and approved management agency under section 1288 of this title.

(5) The term "person" means an individual, corporation, partnership, association, State, municipality, commission, or political subdivision of a State, or any interstate body.

(6) The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. This term does not mean (A) "sewage from vessels" within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a

well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources.

(7) The term "navigable waters" means the waters of the United States, including the territorial seas.

(8) The term "territorial seas" means the belt of the seas measured from the line of ordinary low water along that portion of the coast which is in direct contact with the open sea and the line marking the seaward limit of inland waters, and extending seaward a distance of three miles.

(9) The term "contiguous zone" means the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone.

(10) The term "ocean" means any portion of the high seas beyond the contiguous zone.

(11) The term "effluent limitation" means any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters, the waters of the contiguous zone, or the ocean, including schedules of compliance.

(12) The term "discharge of a pollutant" and the term "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

(13) The term "toxic pollutant" means those pollutants, or combinations of pollutants, including disease-causing agents, which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly by ingestion through food chains, will, on the basis of information available to the Administrator, cause death, disease, behavioral abnormalities, cancer, genetic mutations, physiological malfunctions (including malfunctions in reproduction) or physical deformations, in such organisms or their offspring.

(14) The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged.

(15) The term "biological monitoring" shall mean the determination of the effects on aquatic life, including accumulation of pollutants in tissue, in receiving waters due to the discharge of pollutants (A) by techniques and procedures, including sampling of organisms representative of appropriate levels of the food chain appropriate to the volume and the physical, chemical, and biological characteristics of the effluent, and (B) at appropriate frequencies and locations.

(16) The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

(17) The term "schedule of compliance" means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

(18) The term "industrial user" means those industries identified in the Standard Industrial Classification Manual, Bureau of the Budget, 1967, as amended and supplemented, under the category of "Division D—Manufacturing" and such other classes of significant waste producers as, by regulation, the Administrator deems apropriate.

(19) The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water. (June 30, 1948, ch. 758, title V, § 502, as added Oct. 18, 1972, Pub. L. 92–500, § 2, 86 Stat. 886.)

§ 1369. Administrative procedure and judicial review.

(a)(1) For purposes of obtaining information under section 1315 of this title, or carrying out section 1367(e) of this title, the Administrator may issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and he may administer oaths. Except for effluent data, upon a showing satisfactory to the Administrator that such papers, books, documents, or information or particular part thereof, if made public, would divulge trade secrets or secret processes, the Administrator shall consider such record, report, or information or particular portion thereof confidential in accordance with the purposes of section 1905 of Title 18, except that such paper, book, document, or information may be disclosed to other officers, employees, or authorized representatives of the United States concerned with carrying out this chapter, or when relevant in any proceeding under this chapter. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon

any person under this subsection, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Administrator, to appear and produce papers, books, and documents before the Administrator, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

(2) The district courts of the United States are authorized, upon application by the Administrator, to issue subpenas for attendance and testimony of witnesses and the production of relevant papers, books, and documents, for purposes of obtaining information under sections 1314(b) and (c) of this title. Any papers, books, documents, or other information or part thereof, obtained by reason of such a subpena shall be subject to the same requirements as are provided in paragraph (1) of this subsection.

(b)(1) Review of the Administrator's action (A) in promulgating any standard of performance under section 1316 of this title, (B) in making any determination pursuant to section 1316(b)(1)(C) of this title, (C) in promulgating any effluent standard, prohibition, or pretreatment standard under section 1317 of this title, (D) in making any determination as to a State permit program submitted under section 1342(b) of this title, (E) in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, or 1316 of this title, and (F) in issuing or denying any permit under section 1342 of this title, may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person

resides or transacts such business upon application by such person. Any such application shall be made within ninety days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such ninetieth day.

(2) Action of the Administrator with respect to which review could have been obtained under paragraph (1) of this subsection shall not be subject to judicial review in any civil or criminal proceeding for enforcement.

(c) In any judicial proceeding brought under subsection (b) of this section in which review is sought of a determination under this chapter required to be made on the record after notice and opportunity for hearing, if any party applies to the court for leave to adduce additional evidence, and shows to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Administrator, the court may order such additional evidence (and evidence in rebuttal thereof) to be taken before the Administrator, in such manner and upon such terms and conditions as the court may deem proper. The Administrator may modify his findings as to the facts, or make new findings, by reason of the additional evidence so taken and he shall file such modified or new findings, and his recommendation, if any, for the modification or setting aside of his original determination, with the return of such additional evidence. (June 30, 1948, ch. 758, title V, § 509, as added Oct. 18, 1972, Pub. L. 92-500, § 2, 86 Stat. 891, and amended Dec. 28, 1973, Pub. L. 93-207, § 1 (6), 87 Stat. 906.)

PART 420—IRON AND STEEL MANUFACTURING POINT SOURCE CATEGORY

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420.83 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
420.84 [Reserved]
420.85 Standards of performance for new sources.
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420.90 Applicability; description of the electric arc furnace (semiwet air pollution control methods) subcategory.
420.91 Specialized definitions.
420.92 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
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420.101 Specialized definitions.
420.102 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
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420.110 Applicability; description of the vacuum degassing subcategory.
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420.112 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

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420.113 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.
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420.120 Applicability; description of the continuous casting and pressure slab molding subcategory.
420.121 Specialized definitions.
420.122 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.
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420.171 Specialized definitions.
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420.180 Applicability; description of the pickling-hydrochloric acid-batch and continuous subcategory.
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420.192 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

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420.201 Specialized definitions.
420.202 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

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420.210 Applicability; description of the hot coatings-terne subcategory.
420.211 Specialized definitions.
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420.220 Applicability; description of the miscellaneous runoffs-storage piles, casting, and slagging subcategory.
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420.230 Applicability; description of the combination acid pickling (batch and continuous) subcategory.
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420.260 Applicability; description of the continuous alkaline cleaning subcategory.
420.261 Specialized definitions.
420.262 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

AUTHORITY: Secs. 301, 304 (b), (c), 306 (b), (c), 307(c), Federal Water Pollution Control Act, as amended (the Act) (33 U.S.C. 1251, 1311, 1314 (b), (c), 1316 (b), (c), 1317(c)); 86 Stat. 816 et seq.; Pub. L. 92-500

SOURCE: Subparts A through L appear at 39 FR 24119, June 28, 1974, unless otherwise noted.

Subparts M through Z appear at 41 FR 18004, Mar. 29, 1976, unless otherwise noted.

Subpart A—By-Product Coke Subcategory

§ 420.10 Applicability; description of the by-product coke subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the coke making operations conducted by the heating of coal in slot type ovens in the absence of air to produce coke.

§ 420.11 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "cyanide A" shall mean those cyanides amenable to chlorination as described in *1972 Annual Book of ASTM Standards*, 1972, standard D2036-72, Method B, page 553.

(c) The term "product" shall mean coke.

(d) The term "indirect ammonia recovery process" shall mean the production of concentrated ammonia liquor by scrubbing coke-oven gas with a countercurrent water wash, rather than ammonia recovery utilizing a sulfuric acid ammonia absorber.

§ 420.12 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the

equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other availabale information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

(a) Subject to the provisions of paragraphs (b) and (c) of this section and based upon the application of the best practicable control technology currently available the effluent quality required to be achieved under section 301(b)(1)(A) of the Act is as set forth in the following table:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed
(Metric units) kg/kkg of product		
Ammonia	.2736	.0912
Cyanide	.0657	.0219
Oil and Grease	.0327	.0109
Phenol	.0045	.0015
TSS	.1095	.0365
pH	Within the range 6.0 to 9.0.	

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed—
	(English units) lb/1000 lb of product	
Ammonia	.2736	.0912
Cyanide	.0657	.0219
Oil and Grease	.0327	.0109
Phenol	.0045	.0015
TSS	.1095	.0365
pH	Within the range 6.0 to 9.0.	

(b) Application of the factors listed in section 304(b)(1)(B) will require variation from the effluent limitations set forth in this section for any point source subject to such effluent limitations for those coke plants utilizing desulfurization units. The limitations specified may be exceeded up to 15 percent by those facilities equipped with gas desulfurization units to the extent that such measured discharge is necessary by reason of the increased effluent volume generated by these facilities.

(c) Application of the factors listed in section 304(b)(1)(B) will require variation from the effluent limitations set forth in this section for any point source subject to such effluent limitations for those coke plants utilizing the indirect ammonia recovery process. The limitations specified in paragraph (a) of this section may be exceeded up to 30 percent by those facilities recovering ammonia by this technique, to the extent that such measured discharge is necessary by reason of the increased effluent volume generated by this process.

§ 420.13 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity of quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

(a) Subject to the provisions of paragraphs (b) and (c) of this section and based upon the application of the best available technology economically achievable, the effluent quality required to be achieved under section 301(b)(2)(A) of the Act is as set forth in the following table:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
Cyanide A	.0003	.0001
Phenol	.0006	.0002
Ammonia	.0126	.0042
Sulfide	.0003	.0001
Oil and Grease	.0126	.0042
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
Cyanide A	.0003	.0001
Phenol	.0006	.0002
Ammonia	.0126	.0042
Sulfide	.0003	.0001
Oil and Grease	.0126	.0042
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	

(b) Application of the factors listed in Section 304(b)(2)(B) will require variation from the effluent limitations set forth in this section for any point source subject to such effluent limitations for those coke plants utilizing desulfurization units. The limitations specified may be exceeded up to 25 percent by those facilities equipped with gas desulfurization units to the extent that such measured discharge is necessary by reason of the increased effluent volume generated by these facilities.

(c) Application of the factors listed in section 304(b)(2)(B) will require variation from the effluent limitations set forth in this section for any point source subject to such effluent limitations for those coke plants utilizing the indirect ammonia recovery process. The limitations specified in paragraph (a) of this section may be exceeded up to 70 percent by those facilities recovering ammonia by this technique, to the extent that such measured discharge is necessary by reason of the increased effluent volume generated by this process.

§ 420.14 [Reserved]

§ 420.15 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

(a) Subject to the provisions of paragraphs (b) and (c) of this section and based upon the application of the best available demonstrated control technology, processes, operating methods, or other alternatives, the effluent quality required to be achieved by new sources under section 306(e) of the Act is as set forth in the following table:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
Cyanide A	.0003	.0001
Phenol	.0006	.0002
Ammonia	.0126	.0042
Sulfide	.0003	.0001
Oil and Grease	.0126	.0042
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
Cyanide A	.0003	.0001
Phenol	.0006	.0002
Ammonia	.0126	.0042
Sulfide	.0003	.0001
Oil and Grease	.0126	.0042
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	

(b) Application of the factors listed in section 306(b)(1)(B) will require variation from the effluent limitations set forth in this section for any point source subject to such effluent limitations for those coke plants utilizing desulfurization units. The limitations specified may be exceeded up to 25 percent in the case of facilities equipped with gas desulfurization units to the extent that such measured discharge is necessary by reason of the increased emuent volume generated by these facilities.

(c) Application of the factors listed in section 304(b)(2)(B) will require variation from the effluent limitations set forth in this section for any point source subject to such effluent limitations for those coke plants utilizing the indirect ammonia recovery process. The limitations specified in paragraph (a) of this section may be exceeded up to 70 percent by those facilities recovering ammonia by this technique, to the extent that such measured discharge is necessary by reason of the increased effluent volume generated by this process.

§ 420.16 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the by-product coke subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act,

if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibtions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.15; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart B—Beehive Coke Subcategory

§ 420.20 Applicability; descripiton of the beehive coke subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the coke making operations conducted by the heating of coal with the admission of air in controlled amounts for the purpose of producing coke. There are no by-product plants associated with the beehive operation.

§ 420.21 Specialized definitions.

For the purpose of this subpart:

(a) The general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

§ 420.22 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established.

It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish

the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.23 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.24 [Reserved]

§ 420.25 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.26 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the beehive coke subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.25; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its

NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart C—Sintering Subcategory

§ 420.30 Applicability; description of the sintering subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the sintering operations conducted by the heating of iron bearing wastes (mill scale and dust from blast and steelmaking furnaces) together with fine iron ore, limestone, and coke fines in an ignition furnace to produce and agglomerate for charging to the blast furnace.

§ 420.31 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "product" shall mean sinter.

§ 420.32 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional

Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0312	.0104
Oil and grease	.0063	.0021
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0312	.0104
Oil and Grease	.0063	.0021
pH	Within the range 6.0 to 9.0.	

§ 420.33 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
Oil and Grease	.0063	.0021
Sulfide	.00018	.00006
Fluoride	.0126	.0042
TSS	.0156	.0052
pH	Within the range 6.0 to 9.0.	
(English units) lb/1,000 lb of product		
Oil and Grease	.0063	.0021
Sulfide	.00018	.00006
Fluoride	.0126	.0042
TSS	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.34 [Reserved]

§ 420.35 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
Oil and Grease	.0063	.0021
Sulfide	.00018	.00006
Fluoride	.0126	.0042
TSS	.0156	.0052
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
Oil and Grease	.0063	.0021
Sulfide	.00018	.00006
Fluoride	.0126	.0042
TSS	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.36 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the sintering subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.35; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart D—Blast Furnace (Iron) Subcategory

§ 420.40 Applicability; description of the blast furnace (iron) subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the iron making operations in which iron ore is reduced to molten iron in a blast furnace.

§ 420.41 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "cyanide *A*" shall mean those cyanides amenable to chlorination as described in *1972 Annual Book of ASTM Standards*, 1972, Standard D2036–72, Method B, page 553.

(c) The term "product" shall mean iron.

§ 420.42 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, de-

velop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the ex-

tent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
	(Metric units) kg/kkg of product	
TSS	.0780	.0260
Cyanide	.0234	.0078
Phenol	.0063	.0021
Ammonia	.1953	.0651
pH	Within the range 6.0 to 9.0.	

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(English units) lb/1000 lb of product		
TSS	.0780	.0260
Cyanide	.0234	.0078
Phenol	.0063	.0021
Ammonia	.1953	.0651
pH	Within the range 6.0 to 9.0.	

§ 420.43 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0390	.0130
Cyanide *A*	.0004	.00013
Phenol	.0008	.00026
Ammonia	.0156	.0052
Sulfide	.0005	.00016
Fluoride	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0390	.0130
Cyanide *A*	.0004	.00013
Phenol	.0008	.00026
Ammonia	.0156	.0052
Sulfide	.0005	.00016
Fluoride	.0312	.0104
pH	Within the range 6.0 to 9.0.	

§ 420.44 [Reserved]

§ 420.45 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed
(Metric units) kg/kkg of product		
TSS	.0390	.0130
Cyanide *A*	.0004	.00013
Phenol	.0008	.00026
Ammonia	.0156	.0052
Sulfide	.0005	.00016
Fluoride	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0390	.0130
Cyanide *A*	.0004	.00013
Phenol	.0008	.00026
Ammonia	.0156	.0052
Sulfide	.0005	.00016
Fluoride	.0312	.0104
pH	Within the range 6.0 to 9.0.	

§ 420.46 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the blast furnace (iron) subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.45; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart E—Blast Furnace (Ferromanganese) Subcategory

§ 420.50 Applicability; description of the blast furnace (ferromanganese) subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the iron making operations in which iron/manganese ore is reduced to molten ferromanganese in a blast furnace.

§ 429.51 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "cyanide *A*" shall mean those cyanides amenable to chlorination as described in *1972 Annual Book of ASTM Standards*, 1972, Standard D2036-72, Method B, page 553.

(c) The term "product" shall mean ferromanganese.

§ 420.52 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors con-

sidered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this

subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations: Maximum for any one day	Effluent limitations: Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.3129	.1043
Cyanide	.4689	.1563
Phenol	.0624	.0208
Ammonia	1.5636	.5212
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.3129	.1043
Cyanide	.4689	.1563
Phenol	.0624	.0208
Ammonia	1.5636	.5212
pH	Within the range 6.0 to 9.0.	

§ 420.53 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this sec-

tion, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0780	.0260
Cyanide A	.0008	.00026
Phenol	.0016	.00052
Ammonia	.0312	.0104
Sulfide	.0009	.0003
Manganese	.0156	.0052
pH	Within the range 6.0 to 9.0.	

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(English units) lb/1000 lb of product		
TSS	.0780	.0260
Cyanide A	.0008	.00026
Phenol	.0016	.00052
Ammonia	.0312	.0104
Sulfide	.0009	.0003
Manganese	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.54 [Reserved]

§ 420.55 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0780	.0260
Cyanide A	.0008	.00026
Phenol	.0016	.00052
Ammonia	.0312	.0104
Sulfide	.0009	.0003
Manganese	.0156	.0052
pH	Within the range 6.0 to 9.0.	

(English units) lb/1000 lb of product		
TSS	.0780	.0260
Cyanide A	.0008	.00026
Phenol	.0016	.00052
Ammonia	.0312	.0104
Sulfide	.0009	.0003
Manganese	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.56 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the blast furnace (ferromanganese) subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section

306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this stction, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.55; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart F—Basic Oxygen Furnace (Semi-Wet Air Pollution Control Methods) Subcategory

§ 420.60 Applicability: description of the basic oxygen furnace (semiwet air pollution control methods) subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the steelmaking operations conducted for the manufacture of

carbon steel in basic oxygen furnaces equipped with a semi-wet dust collection system.

§ 420.61 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "semiwet" as associated with basic oxygen furnaces shall mean those systems which employ a spray chamber to spray water in excess of the amounts evaporated to condition furnace off-gases to a temperature where the fume and dusts can be removed by dry dust collection equipment. Because excess spray water is used in the spray chamber, an aqueous discharge from that chamber occurs.

§ 420.62 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs)

which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other

limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.63 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.64 [Reserved]

§ 420.65 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.66 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the basic oxygen furnace (semi-wet air pollution control methods) subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.65; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant,

the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart G—Basic Oxygen Furnace (Wet Air Pollution Control Methods) Subcategory

§ 420.70 Applicability; description of the basic oxygen furnace (wet air pollution control methods) subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the steelmaking operations conducted for the manufacture of steel (either carbon or specialty) in a basic oxygen furnace equipped with a wet dust collection system.

[41 FR 13005, Mar. 29, 1976]

§ 420.71 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "wet" as associated with basic oxygen furnaces shall mean those off-gas dust cleaning systems which use entirely wet gas cooling and dust removal operations to scrub contaminants from furnace off-gases, and which produce an aqueous discharge from this operation.

(c) The term "product" shall mean steel.

§ 420.72 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have

not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	

§ 420.73 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
pH	Within the range 6.0. to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
pH	Within the range 6.0 to 9.0.	

§ 420.74 [Reserved]

§ 420.75 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive day shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
pH	Within the range 6.0 to 9.0.	

§ 420.76 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the basic oxygen furnace (wet air pollution control methods) subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.75; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment stsandard applicable to users of such treatment works shall, except in the case of standards providing for no dischcarge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart H—Open Hearth Furnace Subcategory

§ 420.80 Applicability; description of the open hearth furnace subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the steelmaking operations conducted for the manufacture of carbon steel in an open hearth furnace equipped with wet dust collection systems.

§ 420.81 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "product" shall mean steel.

§ 420.82 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes,

products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The

Administrator may approve or disapprove such limitations, specify other limitations, or initiate procedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	

§ 420.83 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Nitrate	.0282	.0094
Zinc	.0080	.0010
pH	Within the range 6.0 to 9.0.	

Effluent characteristic	Effluent limitations	
	Maximum for any 1 day	Average of daily values for 30 consecutive days shall not exceed—
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Nitrate	.0282	.0094
Zinc	.0080	.0010
pH	Within the range 6.0 to 9.0.	

§ 420.84 [Reserved]

§ 420.85 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Zinc	.0080	.0010
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Zinc	.0080	.0010
pH	Within the range 6.0 to 9.0.	

§ 420.86 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the open hearth furnace subcategory. which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.85; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart I—Electric Arc Furnace (Semiwet Air Pollution Control Methods) Subcategory

§ 420.90 Applicability; description of the electric arc furnace (semiwet air pollution control methods) subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the steelmaking operations conducted for the manufacture of carbon steel utilizing electric arc furnaces equipped with semi-wet dust collection systems.

§ 420.91 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "semi-wet" as associated with electric arc furnaces shall mean the dust collection systems which use a spray chamber to spray water in excess of the amounts evaporated to condition furnace off-gases to a temperature where the fume and dusts can be removed by dry dust collection equipment. Because excess spray water is used in the spray chamber, an aqueous discharge occurs.

§ 420.92 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that

facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.93 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point

source subject to the provisions of this subpart after application of the best available technology economically achievable: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.94 [Reserved]

§ 420.95 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart: There shall be no discharge of process waste water pollutants to navigable waters.

§ 420.96 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the electric arc furnace (semiwet air pollution control methods) subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.95; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart J—Electric Arc Furnace (Wet Air Pollution Control Methods) Subcategory

§ 420.100 Applicability; description of the electric arc furnace (wet air pollution control methods) subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the steelmaking operations conducted for the manufacture of carbon steel utilizing electric arc furnaces equipped with wet furnace offgas dust collection.

§ 420.101 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "wet" as associated with electric arc furnaces shall mean those furnace off-gas dust cleaning systems which use entirely wet gas cooling and dust removal operations to scrub contaminants from furnace off-gases, producing aqueous discharges from the operation.

(c) The term "product" shall mean steel.

§ 420.102 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES

permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0312	.0104
pH	Within the range 6.0 to 9.0.	

§ 420.103 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Zinc	.0030	.0010
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Zinc	.0030	.0010
pH	Within the range 6.0 to 9.0.	

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§ 420.104 [Reserved]

§ 420.105 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Zinc	.0030	.0010
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Fluoride	.0126	.0042
Zinc	.0030	.0010
pH	Within the range 6.0 to 9.0.	

§ 420.106 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the electric arc furnace (wet air pollution control methods) subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.105; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart K—Vacuum Degassing Subcategory

§ 420.110 Applicability; description of the vacuum degassing subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the degassing operations conducted by applying a vacuum to molten steel to further refine the steel (either carbon or specialty) produced.

[41 FR 13005, Mar. 29, 1976]

§ 420.111 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "product" shall mean steel.

§ 420.112 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or the State) will if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fundamentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such

limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.113 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0078	.0026
Zinc	.0015	.0005
Manganese	.0015	.0005
Lead	.00015	.00005
Nitrate	.0141	.0047
pH	Within the range 6.0 to 9.0.	

Effluent characteristic	Effluent limitations: Maximum for any one day	Effluent limitations: Average of daily values for thirty consecutive days shall not exceed—
(English units) lb/1000 lb of product		
TSS	.0078	.0026
Zinc	.0015	.0005
Manganese	.0015	.0005
Lead	.00015	.00005
Nitrate	.0141	.0047
pH	Within the range 6.0 to 9.0.	

§ 420.114 [Reserved]

§ 420.115 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations: Maximum for any one day	Effluent limitations: Average of daily values for thirty consecutive days shall not exceed—
(Metric units)	kg/kkg of product	
TSS	.0078	.0026
Zinc	.0015	.0005
Manganese	.0015	.0005
Lead	.00015	.00005
pH	Within the range 6.0 to 9.0.	
(English units)	lb/1000 lb of product	
TSS	.0078	.0026
Zinc	.0015	.0005
Manganese	.0015	.0005
Lead	.00015	.00005
pH	Within the range 6.0 to 9.0.	

§ 420.116 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the vacuum degassing subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.115; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

Subpart L—Continuous Casting and Pressure Slab Molding Subcategory

§ 420.120 Applicability; description of the continuous casting and pressure slab molding subcategory.

The provisions of this subpart are applicable to process waste water discharges resulting from the operations in which steel (either carbon or specialty) is continuously cast or in which alloy or stainless steel is cast into slabs by the pressure slab molding process.

[41 FR 13005, Mar. 29, 1975]

§ 420.121 Specialized definitions.

For the purpose of this subpart:

(a) Except as provided below, the general definitions, abbreviations and methods of analysis set forth in 40 CFR Part 401 shall apply to this subpart.

(b) The term "product" shall mean steel.

§ 420.122 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best practicable control technology currently available.

In establishing the limitations set forth in this section, EPA took into account all information it was able to collect, develop and solicit with respect to factors (such as age and size of plant, raw materials, manufacturing processes, products produced, treatment technology available, energy requirements and costs) which can affect the industry subcategorization and effluent levels established. It is, however, possible that data which would affect these limitations have not been available and, as a result, these limitations should be adjusted for certain plants in this industry. An individual discharger or other interested person may submit evidence to the Regional Administrator (or to the State, if the State has the authority to issue NPDES permits) that factors relating to the equipment or facilities involved, the process applied, or other such factors related to such discharger are fundamentally different from the factors considered in the establishment of the guidelines. On the basis of such evidence or other available information, the Regional Administrator (or the State) will make a written finding that such factors are or are not fun-

damentally different for that facility compared to those specified in the Development Document. If such fundamentally different factors are found to exist, the Regional Administrator or the State shall establish for the discharger effluent limitations in the NPDES permit either more or less stringent than the limitations established herein, to the extent dictated by such fundamentally different factors. Such limitations must be approved by the Administrator of the Environmental Protection Agency. The Administrator may approve or disapprove such limitations, specify other limitations, or initiate proceedings to revise these regulations. The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best practicable control technology currently available:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0780	.0260
Oil and Grease	.0234	.0078
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0780	.0260
Oil and Grease	.0234	.0078
pH	Within the range 6.0 to 9.0.	

§ 420.123 Effluent limitations guidelines representing the degree of effluent reduction attainable by the application of the best available technology economically achievable.

The following limitations establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a point source subject to the provisions of this subpart after application of the best available technology economically achievable:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/kkg of product		
TSS	.0156	.0052
Oil and Grease	.0156	.0052
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Oil and Grease	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.124 [Reserved]

§ 420.125 Standards of performance for new sources.

The following standards of performance establish the quantity or quality of pollutants or pollutant properties, controlled by this section, which may be discharged by a new source subject to the provisions of this subpart:

Effluent characteristic	Effluent limitations	
	Maximum for any one day	Average of daily values for thirty consecutive days shall not exceed—
(Metric units) kg/tkg of product		
TSS	.0156	.0052
Oil and Grease	.0156	.0052
pH	Within the range 6.0 to 9.0.	
(English units) lb/1000 lb of product		
TSS	.0156	.0052
Oil and Grease	.0156	.0052
pH	Within the range 6.0 to 9.0.	

§ 420.126 Pretreatment standards for new sources.

The pretreatment standards under section 307(c) of the Act for a source within the continuous casting subcategory, which is a user of a publicly owned treatment works (and which would be a new source subject to section 306 of the Act, if it were to discharge pollutants to the navigable waters), shall be the standard set forth in 40 CFR Part 128, except that, for the purpose of this section, 40 CFR 128.133 shall be amended to read as follows:

In addition to the prohibitions set forth in 40 CFR 128.131, the pretreatment standard for incompatible pollutants introduced into a publicly owned treatment works shall be the standard of performance for new sources specified in 40 CFR 420.125; provided that, if the publicly owned treatment works which receives the pollutants is committed, in its NPDES permit, to remove a specified percentage of any incompatible pollutant, the pretreatment standard applicable to users of such treatment works shall, except in the case of standards providing for no discharge of pollutants, be correspondingly reduced in stringency for that pollutant.

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Appendix G

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 76-1233

GRAIN PROCESSING CORPORATION, et al., Appellees, v. RUSSELL E. TRAIN, as Administrator, Environmental Protection Agency, Appellant.	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: October 12, 1976
Filed: December 3, 1976

Before GIBSON, Chief Judge, and HEANEY and WEBSTER, Circuit Judges.

ORDER

At issue on this appeal is the validity of the 1977 and 1983 effluent limitation guidelines for existing sources of pollutants within the corn wet milling industry. The United States District Court for the Southern

District of Iowa held that the regulations were invalid[1] because the EPA:

(1) failed to set out a range of effluent reduction values in establishing the guidelines;

(2) failed to set forth the factors to be considered by the permit-issuing authorities in determining whether the guidelines had been met; and

(3) failed to support by evidence in the record the single number limitations established.

Grain Processing Corp. v. Train, 407 F.Supp. 96 (1976). The District Court remanded the matter to the EPA directing the Agency to develop guidelines consistent with its opinion and to base those guidelines on current cost figures.

On appeal, the EPA requests that we defer consideration of this matter until the Supreme Court of the United States decides the *duPont* cases.[2] The EPA contends that in deciding those cases, the Supreme Court will likely determine whether existing source standards are to be reviewed initially by District Courts or Courts

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1. This Court held in *CPC International Inc. v. Train,* 515 F.2d 1032 (1975) (*CPC I*), that Courts of Appeal have jurisdiction to review new source standards and that District Courts had jurisdiction to review existing source standards. We adhered to that decision in *CPC International Inc. v. Train,* 540 F.2d 1329 (1976) (*CPC II*). Other Courts of Appeal have reached a contrary result. *See CPC II, supra* at 1331-1332, n.1.

2. *E. I. duPont de Nemours and Co. v. Train, cert. granted* 44 U.S.L.W. 3592 (1976) (No. 75-978); *E. I. duPont de Nemours and Co. v. Train, cert. granted* 44 U.S.L.W. 3738 (1976) (No. 75-1473); *Train v. E. I. duPont de Nemours and Co., cert. granted* 44 U.S.L.W. 3738 (1976) (No. 75-1705).

of Appeal, whether the EPA may express attainable effluent reduction values as single numbers, and whether the EPA may set forth the factors to be considered by permit-issuing authorities in determining whether the guidelines had been met.

We accept, with reservation, the request of the EPA to defer consideration of this case. Our reservation is that the congressionally stated policy of cleansing our waterways at the earliest possible time will be best served if, during the interim period, the EPA accomplishes the following:

(1) Receives all additional evidence available with respect to whether the guidelines established by the EPA for 1977 and 1983 can be achieved. In light of this order, it will be unnecessary for this Court to determine whether the District Court properly rejected the EPA's motion to supplement the record with data and information not before the Agency at the time the regulations were issued but available as of the date of the District Court's decision.

(2) Specifically determines whether the standards developed by it are sufficiently broad to permit existing plants with different product mixes to meet the 1977 and 1983 standards and determine whether those standards can be met without providing for statistically expected excursions. In this regard, it should be noted that this Court held in *CPC II* that EPA's new plant standards met the requirements of the law in each regard since our decision in *CPC II* was not available to the District Court at the time it issued its decision, and since the new source standards have been revised recently, the EPA should reexamine the matter in light of all currently available evidence, our decision in *CPC II,* and

its revised standards. 41 Fed. Reg. 50823 (1976), *amending* 40 C.F.R. § 406.15.

(3) Use data currently available in determining the costs of implementing the 1977 and 1983 standards.

(4) Permits the appellees to present their recommendations for a standard based on a range of effluent reduction values and a list of factors to be used by permit-issuing authorities in determining where, within that range, the standards for a particular plant should be set. The appellees must also be allowed to introduce such evidence in support of the range and the factors as they desire. In the event the Supreme Court decides that the EPA must use range and factors, the Agency will be in a position to act promptly.

(5) Within thirty (30) days after the Supreme Court issues its decision in the *duPont* cases, the EPA shall either furnish the additional support for the 1977 and 1983 standards previously set or establish new standards consistent with the evidence and the law.

(6) If the appellees are dissatisfied with the Administrator's final action, they will have ten (10) days to file objections with whichever court the Supreme Court finds to be the appropriate one. The parties shall arrange an accelerated briefing schedule with the Clerk of the court in which the petition is filed.

There is one additional matter that we call to the attention of the parties. Much of the record before this Court is prepared without careful collation, evaluation and simplification. Much of the statistical information is quantified in units of measurements other than those used in the proposed standards. Some of the charts and exhibits cannot be read. All of these deficiencies should

be corrected before this matter is again presented for review.

The matter is remanded to the District Court with directions to it to remand to the EPA with instructions to take those actions which are consistent with this order.

The proceedings of the EPA on remand shall be conducted in accordance with the procedural requirements of the ACL, except that the time periods shall be shortened so as to permit the EPA to enter its final order within thirty (30) days of the date that the Supreme Court releases its opinion in the *duPont* cases.

Each party to this proceeding shall bear its own costs.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

Supreme Court, U. S.
FILED
FEB 23 1978
MICHAEL RODAK, JR., CLERK

No. 77-782

In the Supreme Court of the United States

OCTOBER TERM, 1977

AMERICAN IRON AND STEEL INSTITUTE, ET AL.,
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.,
Solicitor General,

JAMES W. MOORMAN,
Assistant Attorney General,

ANGUS MACBETH,
RAYMOND W. MUSHAL,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

JOAN Z. BERNSTEIN,
General Counsel,

JAMES A. ROGERS,
BARRY L. MALTER,
Attorneys,
Environmental Protection Agency,
Washington, D.C. 20460.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-782

AMERICAN IRON AND STEEL INSTITUTE, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 560 F.2d 589. The original opinion of the court of appeals (Pet. App. 29a-129a) is reported at 526 F.2d 1027.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1977. A petition for rehearing was

denied on September 2, 1977. The petition for a writ of certiorari was filed on December 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals exceeded its authority by recalling its mandate and modifying its original judgment in this case, where the court determined that its original decision was inconsistent with a subsequent decision of this Court and with decisions of all other courts of appeals that had dealt with the issue, and where the court further determined that enforcement of its original judgment would disrupt the national program of water pollution control by requiring the Environmental Protection Agency to promulgate for one industry regulations entirely different in form from the comparable regulations promulgated for all other industries.

STATEMENT

On June 28, 1974, the Environmental Protection Agency (EPA) published regulations establishing effluent limitations for point sources in the iron and steel industry engaged in "primary" (or basic manufacturing) operations. 39 Fed. Reg. 24114; 40 C.F.R. 420.10 *et seq.* (Pet. App. 167a-257a). These regulations were part of the nationwide pollution abatement program established by Congress in the Federal Water Pollution Control Act Amendments of 1972 (FWPCAA), 86 Stat. 816, as amended, 33 U.S.C. (Supp. V) 1251 *et seq.*

Petitioners sought review in the Court of Appeals for the Third Circuit, challenging the authority of the EPA to issue effluent-limitation regulations and further contending that the regulations did not conform to the requirements of the FWPCAA. On November 7, 1975, the court of appeals rendered an opinion (Pet. App. 29a-129a) upholding the EPA's authority to issue such regulations but concluding that the ones issued were not in accord with Sections 301 and 304 of the FWPCAA, 33 U.S.C. (Supp. V) 1311 and 1314. Noting that the EPA regulations established only single-number effluent limitations, the court held that Section 301 instead required limitations representing "both the base level or minimum degree of effluent *control* permissible and the ceiling (or maximum amount of effluent discharge) permissible nationwide within a given category" (Pet. App. 53a; emphasis in original). The court further held that guidelines issued under Section 304 were "intended to provide precise guidance to the permit-issuing authorities in establishing a permissible level of discharge that is more stringent than the ceiling" (*ibid.*). The court rejected EPA's position that its recognition of subcategories within the steel industry and its use of variance clauses were adequate to provide the flexibility envisioned by Congress (Pet. App. 55a-56a).

The court of appeals remanded the case to the Administrator for promulgation of Section 304 guidelines specifying "permissible 'ranges' of limitations" and "factors to be taken into account" by the permit-

issuing authority in establishing effluent limitations for particular point sources (Pet. App. 56a-57a). In addition, the court ordered the Administrator to "reconsider the [Section 301] limitations with the base level and ceiling concepts in mind" (Pet. App. 57a). The EPA did not seek rehearing of the decision or a writ of certiorari from this Court.

After the decision of the Third Circuit in this case, four other federal courts of appeals considered whether Sections 301 and 304 required specification of particular "ranges" and "guidance factors," and each reached a conclusion inconsistent with that of the Third Circuit. *Hooker Chemicals & Plastics Corp.* v. *Train*, 537 F.2d 620 (C.A. 2); *American Frozen Food Institute* v. *Train*, 539 F.2d 107 (C.A.D.C.); *FMC Corporation* v. *Train*, 539 F.2d 973 (C.A. 4); *American Petroleum Institute* v. *Environmental Protection Agency*, 540 F.2d 1023 (C.A. 10); *E. I. du Pont de Nemours & Co.* v. *Train*, 541 F.2d 1018 (C.A. 4); *American Paper Institute* v. *Train*, 543 F.2d 328 (C.A.D.C.). This Court granted review in *E. I. du Pont de Nemours & Co.* v. *Train*, *supra*, and affirmed the holding of the Fourth Circuit with respect to that issue. 430 U.S. 112. Stating that the "EPA has the authority to issue regulations setting forth uniform effluent limitations for categories of plants" (430 U.S. at 136), the Court upheld the single-number regulations without requiring development of "ranges" or "guidance factors," noting that the regulations allow for individual differences through grouping by subcategories and allowance of variances. *Id.* at 130-135.

The EPA then moved the court of appeals to recall its mandate in the present case and modify it in conformity with the *du Pont* decision. The court of appeals, after concluding that it had power to take such action in unusual cases (Pet. App. 5a-11a), determined that this was an appropriate case for the exercise of that power. Warning that "the opinion in this matter should not be read as an invitation to litigants to seek review of already adjudicated claims" (Pet. App. 23a), the court stated (*ibid.*):

> [W]e conclude today that recall of the mandate and modification of the judgment in *AISI I* is warranted because of the *confluence* of several unusual factors: the incongruencies, in certain respects, between the opinion in *AISI I* and the Supreme Court's decision in *duPont;* the solitary position of this Court concerning the "range", "guidance" and related matters, a position contrary to that adopted by every court of appeals that has dealt with the issue; the heavy burdens, contrary to the public interest, that adherence to *AISI I* would impose on the national program of water pollution control; the continuing nature of the obligations placed on the agency in the original panel decision; and the relatively moderate effect of the amendment desired by the EPA on the judgment in *AISI I*. [Emphasis in original.]

The court then modified the judgment to conform more nearly with the *du Pont* decision (*id.* at 23a-24a).

ARGUMENT

The decision of the court of appeals is correct, does not conflict with any decision of this Court or of any

court of appeals, and presents no issue warranting review by this Court.

1. Petitioners' principal contention (Pet. 7-12) is that the court of appeals improperly decided to recall its earlier mandate in this case. As petitioners apparently concede that the court of appeals had the power to do so,[1] the only issue in dispute is whether the court abused its authority on the particular facts of this case. This is not a question of general importance. In any event, petitioners' contention is without merit.

The court of appeals correctly recognized that the power to recall a mandate should be exercised "only in unusual instances" (Pet. App. 10a). In the present case, the court took into account that the analysis underlying part of its earlier judgment was inconsistent with the decision of this Court in *du Pont* and had been uniformly rejected by other federal courts of appeals. The court further noted that adherence to its earlier judgment would impose a significant continuing burden on EPA and "would prove disruptive to the national program of water pollution control envisioned by the Act" (Pet. App. 18a). Thus, the

[1] See Pet. 7-8. This Court and numerous courts of appeals have agreed that a court may recall its mandate even though the time for rehearing has expired. See, *e.g.*, *Hazel-Atlas Glass Company* v. *Hartford-Empire Company*, 322 U.S. 238; *Reserve Mining Company* v. *Lord*, 529 F.2d 181 (C.A. 8); *Aerojet-General Corp.* v. *American Arbitration Ass'n*, 478 F.2d 248 (C.A. 9); *Greater Boston Television Corp.* v. *Federal Communications Commission*, 463 F.2d 268 (C.A.D.C.); *Gradsky* v. *United States*, 376 F.2d 993 (C.A. 5); *Legate* v. *Maloney*, 348 F.2d 164 (C.A. 1); *Hines* v. *Royal Indemnity Co.*, 253 F.2d 111 (C.A. 6).

decision to withdraw the mandate was based on a "*confluence* of several unusual factors" (Pet. App. 23a; emphasis in original).

Because "decisions concerning the propriety of such relief must be rendered on a case-by-case basis" (Pet. App. 11a), there is no substance to petitioners' argument (Pet. 9-12) that the decision below conflicts with decisions of other courts of appeals declining to recall mandates. Neither *Iverson* v. *Commissioner*, 257 F.2d 408 (C.A. 8), nor *Legate* v. *Maloney*, 348 F.2d 164 (C.A. 1), involved a similar "confluence of unusual factors"; each simply reflects the exercise of judicial discretion on dissimilar facts. Indeed, the Court of Appeals for the Eighth Circuit has recently elected to recall its mandate in a later case, *National Independent Meatpackers Association* v. *Environmental Protection Agency*, No. 74-1387, decided April 6, 1977 (see App. B, *infra*), where the petitioners had similarly pointed out (App. A, *infra*) that the court's decision was inconsistent with the subsequent holding of this Court in *du Pont*.

In reaching its decision in this case, the court of appeals correctly concluded that its original opinion was at least partly inconsistent with this Court's decision in *du Pont*. While the court did not regard its original decision as "demonstrably wrong," it recognized that this Court in *du Pont* had taken a different view of several key issues. Thus, this Court did not order the development of "range" or "guidance" factors for the Section 304 guidelines, or any alteration of the Section 301 limitations. This Court determined

that under procedures adopted by the EPA, including use of development documents and supporting materials, the purposes of the Section 304 guidelines had been "substantially achieved." This Court found that the EPA's use of subcategorization satisfied congressional expectations regarding a "range," and that EPA's variance procedure was an appropriate part of the effluent limitations guidelines. 430 U.S. at 130-135; see Pet. App. 12a-14a.

It was also proper for the court of appeals to consider the decisions of other circuit courts on these issues. The iron and steel regulations involved here are but one part of a nationwide regulatory system extending to virtually all segments of American industry. Nothing in the FWPCAA suggests that Congress intended certain industries to be regulated by effluent limitations guidelines significantly different in form from those regulating other industries. The result of the court's refusal to modify its mandate would have been, as the court pointed out, that "the pollution control regulations to be applied to categories of similar industrial dischargers would become discordant, with a special set of regulations to govern the iron and steel industry *and* perhaps other industrial categories in the Third Circuit alone" (Pet. App. 18a-19a; emphasis in original). As the Court of Appeals for the Eighth Circuit recently observed in *National Independent Meatpackers Association* v. *Environmental Protection Agency*, 566 F.2d 41, 43:

> Uniform regulation of water pollution on a nationwide basis was a major purpose of the Federal Water Pollution Control Act Amendments. *See E. I. duPont de Nemours & Co.* v. *Train*, 430 U.S. 112, 136 * * * (1977). We are confident that inter-circuit conflicts as to the validity of regulations promulgated pursuant to the Act would seriously impede the EPA's ability to effectively implement the program envisioned by Congress in passing the Act. The interest in avoiding inter-circuit conflicts is especially strong when the potentially conflicting decisions would present different interpretations of federal law intended to be uniformly applied on a nationwide scale.

2. Although petitioners also urge this Court (Pet. 15-17) to review the merits of the decision below, there is no reason to do so. It is now settled law that EPA may promulgate single-number effluent limitations pursuant to Sections 301 and 304 of the Act and that those limitations are binding on permit-issuing authorities, subject only to the variances contained in the regulations themselves. In the light of *du Pont*, it is also established that EPA's single-number limitations are "presumptively applicable," subject only to rebuttal through the variance clause.[2] Further review of these matters, before the lower courts have

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[2] Any disagreement among the circuits on this point prior to *du Pont* was settled when this Court accepted the Fourth Circuit's position of presumptive applicability subject to variance rebuttal, except insofar as the Fourth Circuit had extended the variance provision to new source standards. See 430 U.S. at 138-139.

had a reasonable opportunity to consider and apply the principles set forth in *du Pont*, would be both unnecessary and premature.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

JAMES W. MOORMAN,
Assistant Attorney General.

ANGUS MACBETH,
RAYMOND W. MUSHAL,
Attorneys.

JOAN Z. BERNSTEIN,
General Counsel,

JAMES A. ROGERS,
BARRY L. MALTER,
Attorneys,
Environmental Protection Agency.

FEBRUARY 1978

APPENDIX A

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 1387

THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, a District of Columbia not-for-profit corporation; IOWA BEEF PROCESSORS, INC., a Delaware corporation; J. H. ROUTH PACKING COMPANY, an Ohio corporation; MBPXL CORPORATION, a Missouri corporation; TAMA MEAT PACKING CORPORATION, an Iowa corporation; CALDWELL PACKING COMPANY, INC., a Minnesota corporation; WESTERN MEAT PACKERS, INC., an Arkansas corporation; DONNER PACKING COMPANY, a Wisconsin corporation; BIG FOOT PACKING COMPANY, an Illinois corporation; SPENCER FOODS, INC., a Delaware corporation; PEET PACKING COMPANY, a Michigan corporation; ARBOGAST & BASTIAN, INC., a Pennsylvania corporation; MINDEN BEEF COMPANY, a Nebraska corporation; PLATTE VALLEY PACKING COMPANY, a Nebraska corporation; DUBUQUE PACKING COMPANY, an Iowa corporation; ROBEL BEEF PACKERS, INC., a Minnesota corporation; MADISON FOODS, INC., a Nebraska corporation; NATIONAL BEEF PACKING COMPANY, a Delaware corporation; ROODE PACKING COMPANY, a Nebraska corporation; C. FINKBEINER, INC., an Arkansas corporation; DIGGS PACKING COMPANY, a Missouri corporation; and ADA BEEF COMPANY, a Michigan co-partnership,
PETITIONERS,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENT.

PETITIONERS' MOTION TO RECALL MANDATE

The petitioners, The National Independent Meat Packers Association, *et al.*, move the Court for an order to recall the mandate previously issued on June 19, 1975, that dismissed their appeal for lack of subject matter jurisdiction. *Nat'l Independent Meat Packers Assn.* v. *U.S. Environmental Protection Agency*, 517 F. 2d 1407 (8th Cir. 1975). They seek by this motion to have their petition for review of the action of the United States Environmental Protection Agency in promulgating an amendment to 40 C.F.R., Chapter I, Subchapter N, by adding Part 432 entitled "Effluent Guidelines and Standards for the Meat Products Manufacturing Point Source Category," reinstated for the purpose of judicial review of the merits of that action. The regulations over which review is sought were promulgated pursuant to the Federal Water Quality Amendments of 1972. 33 U.S.C. §1311, *et seq.* The motion is brought under Federal Rule of Appellate Procedure 27 and Eighth Circuit Rule of Procedure 2(c) for all of the reasons stated in the accompanying memorandum.

Dated: March 19, 1977.

Respectfully submitted,

POPHAM, HAIK, SCHNOBRICH,
KAUFMAN & DOTY, Ltd.

By /s/ G. ROBERT JOHNSON
G. Robert Johnson

And /s/ ALLEN HINDERAKER
Allen Hinderaker
4344 IDS Center
Minneapolis, Minnesota 55402
(612) 335-9331

Attorneys for Petitioners

Of Counsel:

Stephen L. Schaeffer
Associate General
Counsel, Iowa Beef
Processors, Inc.
Dakota City, Nebraska
68731

UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

No. 1387

THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, a District of Columbia not-for-profit corporation; IOWA BEEF PROCESSORS, INC., a Delaware corporation; J. H. ROUTH PACKING COMPANY, an Ohio corporation; MBPXL CORPORATION, a Missouri corporation; TAMA MEAT PACKING CORPORATION, an IOWA corporation; CALDWELL PACKING COMPANY, INC., a Minnesota corporation; WESTERN MEAT PACKERS, INC., an Arkansas corporation; DONNER PACKING COMPANY, a Wisconsin corporation; BIG FOOT PACKING COMPANY, an Illinois corporation; SPENCER FOODS, INC., a Delaware corporation; PEET PACKING COMPANY, a Michigan corporation; ARBOCAST & BASTIAN, INC., a Pennsylvania corporation; MINDEN BEEF COMPANY, a Nebraska corporation; PLATTE VALLEY PACKING COMPANY, a Nebraska corporation; DUBUQUE PACKING COMPANY, an Iowa corporation; ROBEL BEEF PACKERS, INC., a Minnesota corporation; MADISON FOODS, INC., a Nebraska corporation; NATIONAL BEEF PACKING COMPANY, a Delaware corporation; ROODE PACKING COMPANY, a Nebraska corporation; C. FINKBEINER, INC., an Arkansas corporation; DIGGS PACKING COMPANY, a Missouri corporation; and ADA BEEF COMPANY, a Michigan co-partnership,

PETITIONERS,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

RESPONDENT.

PETITIONERS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO RECALL MANDATE.

I. THE COURT HAS THE INHERENT POWER TO RECALL ITS MANDATE TO PREVENT INJUSTICE.

Inherent in the appellate courts is the power to recall a mandate. *Riha* v. *International Tel. & Tel. Corp.*, 533 F. 2d 1053, 1055 (8th Cir. 1976) (per curiam); *Reserve Mining Co.* v. *Lord*, 529 F. 2d 181, 188 (8th Cir. 1976) (en banc). The exercise of the power is founded in equity jurisprudence. The power is invoked to prevent injustice. *Greater Boston Television Corporation* v. *F.P.C.*, 463 F. 2d 268, 276-279 (D.C. Cir. 1971), *cert. denied*, 406 U.S. 950 (1972). Accordingly, the determination of whether the power should be exercised turns upon the need shown on the facts of this particular case. *Id.* at 277; *Application of Jones*, 542 F. 2d 65, 68 (C.C.P.A. 1976). It is manifest upon examination of the procedural history in this case that the mandate must be recalled in order that petitioners finally will be afforded the judicial review which they have diligently sought on the merits of their claims.

II. ABSENT RECALL OF THE MANDATE PETITIONERS WILL BE DENIED THEIR RIGHT TO JUDICIAL REVIEW OF THE MERITS OF THEIR CLAIM.

The National Independent Meat Packers Association, *et al.*, has taken every measure legally necessary or possible to obtain judicial review of the merits of the "Effluent Guidelines and Standards for the Meat Products Manufacturing Point Source Category" promulgated by the Environmental Protection Agency. The guidelines, if valid, will impose upon the petitioners substantial waste treatment costs. Yet, to date no court has heard the merits of the petitioners' claims. The Eighth Circuit found itself without subject matter jurisdiction to hear the merits of the petitioners' claims on the basis of *CPC International Inc.* v. *Train*, 515 F. 2d 1032 (8th Cir. 1975). The district court is without subject matter jurisdiction to hear the merits of the petitioners' claims on the basis of *E.I. duPont de Nemours & Co., et al.* v. *Train, Administrator, Environmental Protection Agency, et al.* (Supreme Court, February 23, 1977). The procedural history is summarized as follows:

1. The challenged regulations of the Environmental Protection Agency (EPA) were published on February 28, 1974. 39 Federal Register 7894-7906.

2. The petitioners filed their petition for review before this Court within the statutory 90-day period on May 24, 1974.

3. Just prior to the date by which petitioners' reply brief was to be filed, this Court, on May 5, 1975, issued its decision in *CPC International Inc.* v. *Train, supra (CPCI). CPCI* involved a parallel challenge to EPA regulations involving another industrial category. It held that the regulations were effluent guidelines under section 304 of the Federal Water Quality Amendment of 1972, 33 U.S.C. §1311, *et seq.* and, accordingly, were not reviewable to the Courts of Appeal under section 509 of the Act. 33 U.S.C. §1369.

Since the decision in *CPCI* was dispositive of the petitioners' petition for review, and given this Court's guidance in *CPCI* with regard to the district courts being the appropriate forum for judicial review, petitioners sought the most expeditious route to obtain that review. Accordingly, on May 12, 1975, they moved this Court for summary decision on their petition for review on the basis of *CPCI*. Following EPA's written concurrence to the motion, it was granted on June 19, 1975. *Nat'l Independent Meat Packers Assn.* v. *U.S. Environmental Protection Agency*, 517 F. 2d 1407 (8th Cir. 1975).

Petitioners then brought suit in the District Court for the District of Nebraska putting in issue the legality of the regulations of the EPA.

5. On July 28, 1976, the district court granted the petitioners a temporary injunction enjoining enforcement of the regulations. The district court said:

> However, in light of the jurisdictional questions, further action on this Court's part, and on the part of the EPA may very well be an exercise in futility. In all fairness to the Eighth Circuit, they were the first Circuit Court to interpret this vague, imprecise Act, and it is highly probable that today the Eighth Circuit *en banc* would overrule *CPC Int'l.* It is well established that parties cannot confer subject matter jurisdiction on a court and, *a fortiorari,* an appellate court cannot create and confer jurisdiction that does not exist under statute. The Court, after careful consideration of all the factors, determines that its only practical course in this dilemma is to hold that plaintiffs have shown immediate and irreparable injury and a probability of success on the merits, thereby warranting the issuance of a preliminary injunction pursuant to 5 U.S.C. §705 *and to hold further review of the regulations in abeyance pending resolution of the jurisdiction question* by the Supreme Court in *duPont* v. *Train, supra,* or by the Eighth Circuit. Further inquiry by this Court into the Administrative record, with a commensurate order remanding the regulations to the EPA for reconsideration within a shortened period would be unfair to the EPA in the event that this Court is without subject matter jurisdiction. (Memorandum of July 28, 1976, at 10). (Emphasis supplied. Memorandum attached as Exhibit A.)

As stated, the merits of the petitioners' claims were specifically avoided by the district court. The court below recognized the hardship this placed upon the petitioners in light of *CPCI*, but was more influenced by its belief that it did not have, contrary to the law of the Eighth Circuit, subject matter jurisdiction. The district court said:

> Although the Court sympathizes with litigants who may be shuttled between courts, this hardship may be alleviated somewhat by waiving the 90-day time-barring provision of §509, 33 U.S.C. §1369(b)(1), and a decision on the full merits at this time may only serve to increase that hardship. (Memorandum of July 28, 1976, at 11.) (Memorandum attached as Exhibit A.)

6. On February 23, 1977, the Supreme Court issued its decision in *E.I. du Pont de Nemours & Co., et al.* v. *Train, Administrator, Environmental Protection Agency, et al., supra,* which holds that subject matter jurisdiction of the petitioners' claims lies in the court of appeals. On February 25, 1977, the EPA moved the district court to vacate the injunction and dismiss the petitioners' complaint for lack of jurisdiction. There is no doubt that the motion should and will be granted. The EPA has not offered, as suggested by the district court, to waive the statutory period of 90 days, long past, in which to bring a second petition for review of the regulations. Indeed, it is not clear that the EPA could waive the statutory period.

The petitioners have been before two courts. On each occasion they have incurred substantial costs in undertaking a comprehensive technical and legal analysis of the voluminous adminsitrative record and numerous legal briefs filed. Yet, to date, these efforts have not resulted in a review of the merits of their claims. Clearly, petitioners are the parties most affected by the regulations which,

they claim, are contrary to law. Their claims are meritorious. The petitioners have shown to the district court a probability of success should the merits be reached. Justice requires this court to recall its mandate to afford petitioners their statutory right to judicial review of the legality of the regulations.

III. RECALL OF THE MANDATE TO PREVENT INJUSTICE WILL NOT FRUSTRATE THE COMPETING INTEREST OF FINALITY OF JUDICIAL DECISIONS.

The Eighth Circuit has held in conformity with prevailing law that the power to recall mandates should be exercised sparingly. *Riha* v. *International Tel. &. Tel. Corp., supra* at 1055. Restraint is exercised so as not to frustrate the competing interest of finality of judgments which brings an orderly end to litigation. *Powers* v. *Bethlehem Steel Corporation,* 483 F. 2d 963, 964 (1st Cir. 1973). Substantial justice is afforded litigants when they have had their day in court even though the decision rendered is arguably wrong. Recall of a mandate is not intended to be a basis for granting rehearings out of time. *Greater Boston Television Corporation* v. *F.C.C., supra* at 277.

Nevertheless, courts have recognized that the factual situation presented by the instant motion is one that requires exercise of the power to recall the mandate. The court stated in *Powers* v. *Bethlehem Steel Corporation, supra* at 964-965:

> "If we were in error in this appraisal, of which we are not presently persuaded, we believe it would be far greater error to permit reconsideration now after denial of petition for rehearing and certiorari. There must be an end to dispute. *If a situation arose, such as a subsequent decision by the Supreme Court,*

> *which showed that our original judgment was demonstrably wrong, a motion to recall mandate might be entertained.*" (Emphasis supplied.)

The Supreme Court's decision in *du Pont* shows demonstrably the error in *CPCI.*

Moreover, there is more reason to grant the petitioners their motion to recall the mandate than was present in the situation posited in *Bethlehem Steel.* Unlike *Bethlehem Steel* where the litigants received judicial consideration on the merits and the court was asked to reverse itself, this Court is simply asked to take review of the merits in the first instance. The power to afford a litigant two days in court should be exercised sparingly. The power to afford a litigant its only day in court should be exercised without restraint.

There should be no restraint of the exercise of the power to recall the mandate because finality has not attached to the regulations of the EPA. The legal validity of the regulations has been continuously in issue since the petitioners' petition for review was filed May 24, 1974. This Court's recall

> The process thus combines judicial supervision with a salutary principle of judicial restraint, an awareness that agencies and courts together constitute a "partnership" in furtherance of the public interest, and are "collaborative instrumentalities of justice." *The court is in a real sense part of the total administrative process, and not a hostile stranger to the office of first instance.* (Emphasis supplied.)

Application of the standard of review announced in *Citizens to Preserve Overton Park, Inc.* v. *Volpe,* 401 U.S. 402 (1971), will ensure that the court will not intrude into the area of discretion vested by Congress in the EPA. Recall of the mandate is necessary to fulfill the second

part of the combination: exercise of the court's supervisory function to ensure conformance with the pertinent requirements of law. Because the court is not "a hostile stranger" to the administrative process, but is a part of it, and because that process has not been completed, the public's interest as well as the interests of the petitioners require the court to recall the mandate.

V. CONCLUSION.

The petitioners have diligently sought judicial review of the merits of EPA regulations that directly and substantially affect their industry. Because of a unique combination of events, their efforts have been completely frustrated. They have been on a circuitous route through two courts, each of which has stated the other to possess proper jurisdiction. Given the Supreme Court's decision in *du Pont* the jurisdictional issue is now settled and justice requires that the mandate of this court be recalled. A recall of the mandate will afford the petitioners their long-awaited right to judicial review of the legality of the EPA regulations.

Dated: March 19, 1977.

Respectfully submitted,

POPHAM, HAIK, SCHNOBRICH,
KAUFMAN & DOTY, Ltd.

By /s/ G. ROBERT JOHNSON
G. Robert Johnson

And /s/ ALLEN HINDERAKER
Allen Hinderaker
4344 IDS Center
Minneapolis, Minnesota 55402
(612) 335-9331

Attorneys for Petitioners

Of Counsel:

Stephen L. Schaeffer, Esq.
Associate General Counsel
Iowa Beef Processors, Inc.
Dakota City, Nebraska 68731

CERTIFICATE OF SERVICE

It is hereby certified that I mailed, postage prepaid, a copy of the foregoing Petitioners' Motion To Recall Mandate and Petitioners' Memorandum In Support Of Their Motion To Recall Mandate to:

Lloyd S. Guerci, Esquire
Attorney, Pollution Control Section
Land and Natural Resources Division
Department of Justice
Washington, D.C. 20530

Richard D. Siegel, Esquire
McNees, Wallace & Nurick
1776 "F" Street, N.W.
Washington, D.C. 20006

Stephen L. Schaeffer, Esquire
Associate General Counsel
Iowa Beef Processors, Inc.
P.O. Box 515
Dakota City, Nebraska 68731

Dated: March 19, 1977.

/s/ ALLEN HINDERAKER
Allen Hinderaker

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

THE NATIONAL INDEPENDENT MEAT PACKERS ASSOCIATION, ETC., ET AL,
PETITIONERS,

vs.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL,
RESPONDENTS.

No. 74-1387.

September Term, 1976

PETITION FOR REVIEW OF PROMULGATION OF AN AMENDMENT, ETC.

On July 16, 1975 certified copies of the Court's judgment of June 19, 1975 were transmitted to counsel in lieu of issuance of mandate.

On consideration of various motions now pending before the Court it is now ordered:

(1) Petitioners' unopposed motion to recall mandate is granted. The Clerk of this Court is to re-open this case on the records of the Court.

(2) Suggestion of respondent United States Environmental Protection Agency that the case be transferred to the United States Court of Appeals for the Seventh Circuit is denied. We deny the transfer as the Seventh Circuit has already decided the case previously before it. *American Meat Institute* v. *EPA*, 526 F. 2d 442 (1975).

(3) The Clerk of this Court is directed to establish a schedule for the parties to submit revised or supplementary briefs should either petitioners or respondents desire to do so.

April 6, 1977.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 [illegible] 110